TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 81.

THE MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS DOUGHTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED AUGUST 10, 1908.

(20,329.)

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1 STATE OF NORTH DAKOTA, *ss:*

In Supreme Court.

THOMAS DOUGHTY, Plaintiff and Respondent,
vs.
THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, Defendant and Appellant.

I, R. D. Hoskins, Clerk of the Supreme Court of the State of North Dakota, do hereby return to the Supreme Court of the United States, in pursuance to the subjoined writ of error, the following papers, to-wit:—

Original Petition for Writ of Error.
Original Assignment of Errors.
Original Writ of Error.
Original Citation.
Original Supersedeas Bond.
Copy of Record on Appeal, filed in this office, from the District Court of Foster County, State of North Dakota.
Copy of Order for Judgment of the Supreme Court, State of North Dakota.
Copy of Original Opinion of the Supreme Court, State of North Dakota.

Witness, my hand and official seal, at Bismarck in said state of North Dakota, this 25th day of July, A. D. 1906.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of Supreme Court, State of North Dakota.

2 STATE OF NORTH DAKOTA:

Supreme Court.

THOMAS DOUGHTY, Plaintiff and Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable D. E. Morgan, Chief Justice of the Supreme Court of the State of North Dakota:

Now comes the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation of the State of North Dakota, and a citizen of said state, by its attorneys L. W. Gammons, Fredus Baldwin and Alfred H. Bright, Esqs., and complains that, in the records and proceedings and also in the rendition of the judgment in the suit be-

tween Thomas Doughty, plaintiff, and the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, defendant, in the Supreme Court of the State of North Dakota, that being the highest court of law or equity in said state of North Dakota in which a decision could be had in said suit and in which a final judgment was rendered against the defendant on the 16th day of May, 1906, it was adjudged that the plaintiff had the right to recover the right of way used and occupied by the defendant over and across the land of the plaintiff in Foster County, North Dakota, and claimed by the defendant under the Right of Way Act of the Congress of the United States, known as the Act of March 3, 1875; and that said decision is contrary to the provisions of said Act of Congress.

All of which appears in the records and pleadings in said suit, whereby manifest error has happened to the great damage of
3 the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, defendant in said suit.

Wherefore, said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the defendant in said suit, prays for the allowance of a writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

L. W. GAMMONS,
FREDUS BALDWIN,
Attorneys for Defendant.

ALFRED H. BRIGHT,
Of Counsel.

Allowed:

D. E. MORGAN,
Chief Justice of the Supreme Court
of the State of North Dakota.

Bismarck, North Dakota, June 7th, 1906.

4 [Endorsed:] State of North Dakota Supreme Court. Thomas Doughty, Pl'f & Resp., *vs.* Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., Def't & Appellant. Petition for writ of error. 1473. Filed in the Clerk's Office, Supreme Court, State of North Dakota, Jun- 16, 1906. R. D. Hoskins, Clerk. L. W. Gammons, Minot, N. D., Fredus Baldwin, Jamestown, N. D., Defendant's Att'ys. Alfred H. Bright, Soo Line Bldg., Mpls. Minn., Of Counsel.

5 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS DOUGHTY, Defendant in Error.

Assignment of Errors.

The plaintiff in error respectfully submits that the Supreme Court of the State of North Dakota erred in this:—

1. The court erred in holding that the filing of the plat and the approval thereof by the Secretary of the Interior were conditions precedent to the acquisition of right of way under the Act of March 3, 1875.

2. The court erred in holding that the homestead entry made by the defendant in error subsequent to the definite location of the railway of plaintiff in error, but before the filing and approval of the plat showing such location, gave to defendant in error priority of right as to said right of way.

3. The court erred in holding that the plaintiff in error had not, at the time of said homestead entry, any vested or accrued interest, claim, right or title to the strip of land used by it as a right of way across the tract of land entered by the defendant in error as a homestead.

4. The court erred in sustaining the judgment against the plaintiff in error and in favor of the defendant in error for One Thousand Dollars ($1,000) damages on account of the appropriation and use of the right of way claimed by the plaintiff in error under and by virtue of the Act of Congress of March 3, 1875, granting right of way over public lands to railways.

Dated this 12th day of June, 1906.

L. W. GAMMONS AND
FREDUS BALDWIN,
Attorneys for Plaintiff in Error.

ALFRED H. BRIGHT,
Of Counsel.

6 [Endorsed:] Supreme Court of the United States. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., Plaintiff in Error, *vs.* Thomas Doughty, Defendant in Error. Assignment of Errors. 1473. Filed in the Clerk's Office, Supreme Court, State of North Dakota, Jun- 16, 1906. R. D. Hoskins, Clerk. L. W. Gammons, Minot, N. D., Fredus Baldwin, Jamestown, N. D., Att'ys for Pl'f in Error, Alfred H. Bright, Of Counsel, Minneapolis, Minn.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of North Dakota, Greeting:

Because that in the records and proceedings and also in the rendition of the judgment of a plea which is in the Supreme Court of North Dakota, before you or some of you, being the highest court of law or equity in said state in which a decision could be had in the said suit between Thomas Doughty, plaintiff, and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, defendant, wherein was drawn in question the proper construction of an act of Congress, known as the Act of March 3rd, 1875, granting right of way over the public lands of the United States and other privileges to railway companies, a manifest error hath happened to the great damage of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, as by its complaint appears; we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first day of the next term of said court, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs — the United States should be done.

Witness: The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of June, A. D. 1906.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk Circuit Court of United States,
By E. V. EGGRET, *Deputy.*

8 [Endorsed:] State of North Dakota Supreme Court. Thomas Doughty, Pl'f & Resp. *vs.* Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., Def't & Appellant. Writ of Error. 1473. Filed in the Clerk's Office, Supreme Court, State of North Dakota, Jun- 16 1906. R. D. Hoskins Clerk. L. W. Gammons, Minot, N. D. Fredus Baldwin, Jamestown, N. D. Defendant's Att'ys. Alfred H. Bright, Soo Line Bldg. M'p'l's Minn. Of Counsel.

9 F. Baldwin, Attorney.

Jamestown, N. Dak.

UNITED STATES OF AMERICA:

Supreme Court.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO.
vs.
THOMAS DOUGHTY, Def't.

Personal service of the Citation to the United States of America, Supreme Court in the above entitled case, dated June 16th. 1906 and signed by Hon. D. E. Morgan, Chief Justice of the Supreme Court of the State of North Dakota and duly attested by R. D. Hoskins Clerk thereof and seal of said Court, is hereby admitted at Jamestown, N. D. on the 23rd. day of July, A. D. 1906.

S. E. ELLSWORTH.
Attorney for Defendant in Error.

10 UNITED STATES OF AMERICA:

Supreme Court.

Citation.

United States of America to Thomas Doughty, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at Washington, on the first day of the next term of said court, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of North Dakota, wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness: The Honorable D. E. Morgan, Chief Justice of the Supreme Court of the State of North Dakota, this 16 day of June, A. D. 1906.

[Seal of North Dakota Supreme Court.]

D. E. MORGAN,
Chief Justice of the Supreme Court of the State of North Dakota.

Attest:
R. D. HOSKINS, *Clerk.*

11 [Endorsed:] United States of America Supreme Court. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., Plaintiff in Error *vs.* Thomas Doughty, Defendant in Error. Citation.

1473. Filed in the Clerk's Office, Supreme Court, State of North Dakota, Jun- 16 1906. R. D. Hoskins Clerk. L. W. Gammons, Minot, N. D. Fredus Baldwin, Jamestown, N. D. Attorneys for Pl'f In Error. Alfred H. Bright, Soo Line Bldg., Minneapolis, Minn. Of Counsel.

12 STATE OF NORTH DAKOTA:

In Supreme Court.

THOMAS DOUGHTY, Plaintiff and Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant and Appellant.

Supersedeas Bond.

Know all men by these presents, That we, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, as principal, and National Surety Company, as surety, are held and firmly bound unto the United States of America, in the full and just sum of two thousand dollars ($2000.00), to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of June A. D. 1906.

Whereas, the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of North Dakota;

Now therefore, the condition of this obligation is such that if the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company shall prosecute its said writ of error to effect and answer
13 all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Corporate Seal of Minneapolis, St. Paul & Sault Ste. Marie Railway Company.]

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By E. PENNINGTON, *Vice President.*

Attest:
CHARLES F. CLEMENT.

[Seal of National Surety Company, New York. Incorporated 1897.]

NATIONAL SURETY COMPANY,
By CHAS. W. JOYCE, *Attorney in Fact.*

Attest:

——— ———.

STATE OF MINNESOTA, *County of Hennepin, ss:*

On this 15 day of June, A. D. 1906, before me, a notary public, within and for said county, personally appeared E. Pennington and Charles F. Clement, to me personally known, who, being each by me duly sworn, did say that they are respectively the Vice President and Secretary of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said E. Pennington and Charles F. Clement acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal, Hennepin Co., Minn.]

J. E. WESTLAKE,
Notary Public, Hennepin Co., Minn.

My Commission Expires Feb. 18, 1912.

STATE OF MINNESOTA, *County of Hennepin, ss:*

On this 15th day of June, A. D. 1906, before me appeared Chas. W. Joyce, to me personally known, who being by me duly sworn, did say that he is the attorney in fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Chas. W. Joyce acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal, Hennepin Co., Minn.]

F. C. BEURLEN,
Notary Public, Hennepin County, Minnesota.

My Commission expires Feb. 23, 1911.

14-67 [Endorsed:] State of North Dakota In Supreme Court Thomas Doughty Pl'f & Resp. *vs.* Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., Def't & Appellant. Supersedeas Bond Approved: D. E. Morgan Chief Justice, Supreme Court, N. Dak 1473 Filed in the Clerk's Office, Supreme Court, State of North Dakota, Jun- 16 1906 R. D. Hoskins, Clerk. L. W. Gammons, Minot, N. D. Fredus Baldwin, Jamestown, N. D. Defendant's Att'ys, Alfred H. Bright, Soo Line Bldg., Of Counsel. M'p'l's, Minn.

68 File No. 1473.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

Appeal from the District Court of Foster County.

THOMAS DOUGHTY, Plaintiff and Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant and Appellant.

This action coming on to be heard at the March A. D. 1906 term of this Court, at the Supreme court room, in the City of Fargo, State of North Dakota:

Present: D. E. Morgan, Chief Justice; Edward Engerud, and N. C. Young, Associate Justices, and the appeal herein having been argued by A. H. Bright for the Appellant and by S. E. Ellsworth for Respondent, and the Court having advised thereon, it is now here considered, ordered and adjudged that the judgment of the said District Court within and for said Foster County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

And it is further considered and adjudged, That Respondent have and recover of the Appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated May 16, 1906.

By the Court,

D. E. MORGAN,
Chief Justice.

[SEAL.] R. D. HOSKINS, *Clerk.*

(Endorsed:) Filed in Court this 16th day of May, 1906. R. D. Hoskins, Clerk.

69 In the Supreme Court, State of North Dakota, March Term, 1905.

THOMAS DOUGHTY, Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

The act of Congress approved March 3d, 1875, granting a right of way over the public lands for the construction of railroads, confers no right to such easement in lands occupied by a homesteader, whose possessory right attached before the railroad was actually constructed and before its map of definite location had been approved by the Secretary of the Interior, although the company was qualified to take under the act and had determined by a final survey the exact location for its road across the settler's land before the latter acquired any rights.

(Syllabus by the Court.)

Appeal from the District Court of Foster County; E. T. Burke, Judge.

L. W. Gammons and F. Baldwin, for appellant. Alfred H. Bright of counsel.

S. E. Ellsworth for respondent.

ENGERUD, *J.:*

The plaintiff brought this action to recover from the Minneapolis, St. Paul and Sault Ste. Marie Ry. Company, compensation for injury to his land caused by the construction and operation of defendant's railway across the same. A jury was waived; and the action was tried to the court. Judgment was ordered and entered in favor of the plaintiff, awarding him damages in the sum of $1000. The defendant appealed from the judgment.

70 The appellant's contention is that the facts found by the court show that the appellant railway company had acquired a right of way over the land in question by virtue of the Act of Congress, approved March 3d, 1875, (18 St. at Large, p. 482, Ch. 152) and that plaintiff took the land subject to defendant's easement therein. No other question is presented by the assignments of error. By failing to settle a statement of the case containing specifications of error, and incorporate same in the printed abstract, the appellant must be held to concede that the findings are supported by the evidence. It is expressly conceded that the findings cover all material issues presented by the pleadings.

The facts upon which defendant relies to establish its claim to immunity from liability are found by the court substantially as pleaded in the answer; so the question really is as to the sufficiency of the facts pleaded in the answer to show that the defendant had ac-

quired an easement in the land under the act of 1875, before plaintiff's rights attached.

On June 25th, 1892, the plaintiff's application to enter the quarter section in question was presented to and accepted by the register and receiver of the United States Land Office at Fargo. On July 1st, 1892, the plaintiff took up his residence on the land under his homestead entry and in all things complied with the Federal homestead laws. On November 4th, 1899, a patent conveying the title to him was issued. That instrument makes no mention of any easement in favor of the railroad.

The defendant railway company was organized in 1891. Its articles were filed with the Secretary of the Interior on March 26th, 1891, and approved by him on April 15th, 1891; and it thereby became entitled to the benefit of the act of March 3d, 1875.

In October, 1891, the company made a preliminary survey of its proposed line of railway across the land; and on May 13th, 1892, completed its final survey, definitely fixing the line of its proposed road over the quarter section. The line as surveyed was marked by stakes driven into the ground one hundred feet apart, indicating the center of the roadway to be constructed. The definite location of the route as fixed by this survey was approved and adopted by the company's board of directors on June 17th, 1892, being eight days before the plaintiff made his homestead filing.

71

The map or profile of its road as thus definitely located was filed in the local land office at Fargo on July 20th, 1892, and received the approval of the Secretary of the Interior on October 14th, 1892. In the latter part of July, 1892, the company constructed its road across the land, on the line as surveyed, and ever since has operated its railway over the roadway so constructed, using and appropriating for that purpose a strip 200 feet wide, 100 feet on each side of the center of the track.

This court held in Jamestown & Northern Ry. Co. *vs.* Jones, 7 N. D. 619, that the benefits of this act of 1875 could be acquired only by compliance with all the conditions imposed by Sec. 4 of that act; and that a settlement upon the land by a claimant under the Federal land laws after the construction of the road, but before approval of the map of definite location, defeated the company's acquisition of a free right of way under the act, as against the settler in possession. That decision was reversed by the United States Supreme Court in Jamestown & Northern Railway Co. *vs.* Jones, 177 U. S. 125. That court held that the grant took effect when a grantee qualified to take, had definitely located the right of way claimed under the grant. It was held that the actual construction of the road constituted such definite location.

In the case at bar, the actual work of construction was not begun until after plaintiff's possessory rights accrued. Consequently if actual construction is the first act, sufficiently identifying the definite location of the right of way, then the judgment must be affirmed because the decision of the United States Supreme Court in the Jamestown and Northern case, clearly establishes that the grant takes effect, from the date of the definite location and not before.

To the same effect is also the decision in Washington & I. Railway Co. *vs.* Osborne, 160 U. S. 103.

72 Appellant contends that the final survey definitely locating the right of way is an act on the part of the company, which, when promptly followed up by actual construction, is sufficient to constitute a definite location. The argument appeals to us with much force. The necessary inference from the language used by Mr. Justice McKenna, however, in the Jamestown & Northern case, is, it seems to us, that actual construction is the only sufficient act, other than compliance with Section Four, to constitute a definite location, and the right of way does not exist before actual construction unless the company's profile map has been approved by the Secretary, before the settler's rights attached.

That decision is conclusive upon us and it would be neither proper nor profitable for this court to set forth its own views as to whether or not the language used in that decision ought to be modified.

The judgment appealed from must, therefore, be affirmed.

All concur.

EDWARD ENGERUD.
D. E. MORGAN.
N. C. YOUNG.

(Endorsed:) Filed in Court this 16th day of May, 1906. R. D. Hoskins, Clerk.

73 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS DOUGHTY, Defendant in Error.

Stipulation.

It is hereby stipulated between counsel in the above entitled suit that the only part of the record returned in said suit which should be printed is embraced in the attached printed abstract, together with the following papers, to-wit: Petition for Writ of Error, Assignment of Errors, Writ of Error, Citation with the admission of service on the same, Supersedeas Bond, Judgment of the Supreme Court of North Dakota, and the Opinion of said court in said cause.

Dated this 30th day of July, 1906.

ALFRED H. BRIGHT,
Counsel for Plaintiff in Error.
CHARLES J. MADDUX,
Counsel for Defendant in Error.

Service of a copy of the Assignment of Errors in said suit, hereto attached, is hereby admitted:

CHARLES J. MADDUX,
Counsel for Defendant in Error.

74 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS DOUGHTY, Defendant in Error.

Assignment of Errors.

The plaintiff in error respectfully submits that the Supreme Court of the State of North Dakota erred in this:—

1. The court erred in holding that the filing of the plat and the approval thereof by the Secretary of the Interior were conditions precedent to the acquisition of right of way under the Act of March 3, 1875.

2. The court erred in holding that the homestead entry made by the defendant in error subsequent to the definite location of the railway of plaintiff in error, but before the filing and approval of the plat showing such location, gave to defendant in error priority of right as to said right of way.

3. The court erred in holding that the plaintiff in error had not, at the time of said homestead entry, any vested or accrued interest, claim, right or title to the strip of land used by it as a right of way across the tract of land entered by the defendant in error as a homestead.

4. The court erred in sustaining the judgment against the plaintiff in error and in favor of the defendant in error for One Thousand Dollars ($1,000) damages on account of the appropriation and use of the right of way claimed by the plaintiff in error under and by virtue of the Act of Congress of March 3, 1875, granting right of way over public lands to railways.

Dated this 12th day of June, 1906.

L. W. GAMMONS &
FREDUS BALDWIN,
Attorneys for Plaintiff in Error.

ALFRED H. BRIGHT,
Of Counsel.

75 In the Supreme Court, State of North Dakota, March Term, 1906.

THOMAS DOUGHTY, Plaintiff and Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY, Defendant and Appellant.

Abstract.

S. E. Ellsworth, Attorney for Plaintiff and Respondent.

L. W. Gammons and F. Baldwin, Attorneys for Defendant and Appellant.

Alfred H. Bright, Of Counsel.

76 In the Supreme Court, State of North Dakota, March Term, 1906.

THOMAS DOUGHTY, Plaintiff and Respondent,
vs.
MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY, Defendant and Appellant.

Complaint.

Plaintiff complains of the defendant and alleges:

1.

That defendant is a railway corporation, created, organized and existing under the laws of the states of Michigan, Wisconsin, Minnesota and North Dakota, and during the times hereinafter mentioned has been doing business as a railway company in the State of North Dakota.

2.

That on June 25th, 1892, the plaintiff being then and there a citizen of the United States, over twenty-one years of age,
77 did by virtue of the Homestead Laws of the United States, and in conformity thereto make his certain homestead entry on the east half of southwest quarter, and lots three and four of Section numbered Eighteen (18) in Township numbered One Hundred Forty-six (146), Range numbered Sixty-six (66), west of the fifth principal meridian, before the United States Land Office, at Fargo, North Dakota, and immediately thereafter, to-wit: On or about July 1st, 1892, plaintiff entered, and made settlement on said land, and was entitled to full use and enjoyment of same from said date.

3.

That subsequent to such filing and settlement, to-wit: On November 4th, 1899, the plaintiff having complied with the United States laws relative to acquiring title to said land under and by virtue of the Homestead Laws of the United States, received a patent for such land from the government of the United States; that plaintiff is now and since November 4th, 1899, has been the owner in fee, and has legal title to, and is now, and since about July 1st, 1892, has been entitled to the full use and enjoyment of said above described land situate in Foster County, North Dakota.

4.

That while plaintiff was in full possession of said premises, under and by virtue of his said homestead entry and settlement on said land, the said defendant, by its agents, servants and repre-
78 sentatives did on or about August 1st, 1892, enter upon said premises and seize and take possession of a strip of land of the width of one hundred feet, running diagonally through said

premises, and being that certain strip of land now used by said defendant through said premises for railroad purposes and part of the main line of said defendant's railway.

5.

That defendant caused ditches to be dug and a high embankment of earth to be thrown up on said premises, upon which said defendant caused to be constructed a railroad, to the great damages of said premises; and defendant has ever since the wrongful taking of said premises on or about August, 1892, to the present time and does now use said premises for railroad purposes, using cars and steam engines and running trains across same daily. The said defendant has at all times ousted plaintiff and excluded him from said premises and has exercised all the powers of ownership over the same.

6.

That by the said wrongful taking and use of said premises for railroad purposes, plaintiff has been greatly damaged in this, viz: Plaintiff has been deprived of the peaceable enjoyment and use of his land within said strip so taken as aforesaid; that his said described premises is cut into many three cornered pieces, irregular shaped tracts, and made of greatly impaired convenience and
79 decreased value for farming or any other purpose; that plaintiff's premises are subject to increased hazard from fire and otherwise damaged and depreciated in value; that by the said wrongful taking of said land and the use of the same for railroad purposes the plaintiff has sustained damages in the sum of Sixteen Hundred Dollars.

7.

That the defendant has never, and no other person has ever instituted proceedings to condemn said strip of land and no proceedings or process has been resorted to by defendant or by any other person to divest plaintiff of the ownership or title thereto save and except the wrongful and forcible taking thereof as hereinbefore stated; that plaintiff never consented or agreed to such taking by defendant or any person or corporation and has never received any compensation whatever for his said land or for said injuries from defendant or from anyone, and that same have never been tendered to plaintiff by defendant or any other person.

Wherefore plaintiff prays judgment against said defendant for the sum of Sixteen Hundred Dollars with interest and his costs.

GEO. W. SOLIDAY,
Attorney for Plaintiff, Carrington, N. D.

Answer.

The above named defendant, the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, by Mark E. Wilson and Alfred
80 H. Bright, its attorneys, answering the complaint of the plaintiff in this action, admits that it is a railway corporation

organized and existing under the laws of the states of Michigan, Wisconsin, Minnesota and North Dakota, and that, during all the times alleged in said complaint was, and now is operating a line of railway in the state of North Dakota; and the defendant alleges that by its articles of incorporation and the laws of the state of North Dakota, it was authorized to build and operate the line of railway which crosses the land described in said complaint.

The defendant further admits that the plaintiff was qualified to enter any land open to public entry as a homestead, under the statutes of the United States, on the 25th day of June, 1892; that on that date he entered as a homestead the land described in said complaint at the United States Land Office at Fargo, North Dakota, and afterwards, to-wit, on or about the 1st day of July, 1892, entered upon said land and made a settlement thereon; that subsequent to such filing and settlement, to-wit: on November 4, 1899, plaintiff received a patent for said lands from the government of the United States. The defendant further admits that no proceedings have been instituted to condemn the strip of land occupied by it as a right of way across the premises described in said complaint, and that the plaintiff has never received any compensation for the use of said strip of land for railway purposes. The defendant further admits

81 that, during the months of July and August, 1892, it constructed a line of railway across the lands described in said Complaint on a line which had been located by it prior to the said entry of the plaintiff, which said line is the center line of the railroad of the defendant as now constructed and operated over said lands; that, from the time of the location of said center line of its said railway until the present time, defendant has occupied the strip of land claimed by it, as its right of way across said premises, against all persons and has exercised all the powers of ownership over the same; but the defendant denies that by the taking and use of said strip of land for railroad purposes it has damaged the plaintiff or deprived him of any enjoyment or use of said land to which he was legally entitled, and denies that in the construction and operation of said railroad it has caused any damage to said premises so entered and settled by the plaintiff as aforesaid for which it is under any obligation to compensate the plaintiff.

2. Except as hereinbefore admitted, qualified or denied, the defendant denies each and every allegation of said complaint.

3. Further answering the said complaint, the defendant alleges that, on the 26th day of March, 1891, the defendant filed with the Secretary of the Interior its articles of incorporation and due proofs of its organization; and that, on the 15th day of April, 1891, the same were approved by the Secretary of the Interior; that, on the

82 13th day of May, 1892, defendant made the line of definite location of its railway across the land referred to in said complaint, which line was adopted by resolution of its Board of Directors on the 17th day of June, 1892; that, on the 20th day of July, 1892, the defendant filed with the Local Land Office at Fargo, North Dakota, a map showing the definite location of said line of

railway, and that said map was approved by the Secretary of the Interior of the United States, October 14th, 1892; that the location of said line of railway was shown by grade stakes set in the ground across said tract of land at intervals of 100 feet, which said stakes were plainly visible; that, during the months of July and August, 1892, the defendant began the construction of its railway across said tract of land on said located line and completed the grade thereof during the said month of August; that, in the Month of November of the year 1892, the defendant laid its tracks on said grade across said tract of land and soon thereafter began the operation of said railway, and has ever since continued to opearte the same; that, defendant fully complied with the requirements of the Act of Congress of March 3rd, 1875, granting the right of way over the public lands of the United States to railways.

The defendant further alleges that, at the time of the filing and settlement of the plaintiff hereinbefore referred to, the defendant had appropriated and was in the occupation of a strip of land 100 feet on either side of said located line, and has ever since remained
83 in the possession thereof under and by virtue of said Act of Congress; that, prior to the said filing and settlement of the plaintiff, defendant had obtained a considerable portion of the right of way, along said located line, which was then owned by individuals or in which they had an interest, including a tract of land adjoining the premises described in the Complaint, and that the contract for the construction of its railway on said line over said premises had been entered into prior to said entry.

Wherefore the defendant demands that said complaint be dismissed and for its costs and disbursements in said action.

Order for Judgment.

The above entitled cause came regularly on for trial at a special term of the District Court aforesaid, held in and for the County of Foster and State of North Dakota, on the 13th day of May, A. D. 1905, and was tried before the court without a jury, a jury having been expressly waived by agreement of parties, the plaintiff appearing in person and by S. E. Ellsworth, his attorney, and the defendant appearing by Alfred H. Bright, its attorney. Thereupon evidence was introduced by and on behalf of both plaintiff and defendant and the Court having duly considered the testimony offered as aforesaid and the oral arguments of counsel for both parties; and written briefs filed on behalf of both plaintiff and defendant and being fully advised in the premises, now makes the following:

84 *Findings of Fact.*

I.

The plaintiff, Thomas Doughty, was on the 25th day of June, A. D. 1892, a citizen of the United States, over the age of 21 years

and in all respects qualified to make a homestead entry on public lands under the laws of the United States. On the 25th day of June, A. D. 1892, the said plaintiff being then qualified as aforesaid, made homestead entry at the United States District Land Office at Fargo, North Dakota, upon the following described vacant and surveyed public lands situated in the County of Foster and State of North Dakota, to-wit: The east half of the southwest quarter (E½, SW¼) and lots three (3) and four (4), in Section eighteen (18) in Township one hundred and forty-six (146), north of Range sixty-six (66), west of the fifth principal meridian. Said entry was duly received and noted at said District Land Office and immediately thereafter, to-wit: on or about the first day of July, A. D. 1892, the said plaintiff went upon said land and made settlement upon the same.

II.

The defendant, the Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, was at all times, hereinbefore mentioned, a railway corporation, created, organized and existing under and by virtue of the laws of the states of Michigan, Wisconsin, Minnesota and North Dakota, and at all of said times and ever since
85 has been doing business as a railroad corporation within the State of North Dakota. On or about the 26th day of March, A. D. 1891, the said defendant filed with the Secretary of the Interior, certified copies of its articles of incorporation and due proofs of its organization under the same, and on or about the 15th day of April, A. D. 1891, the same were duly approved by the Secretary of the Interior. About October, A. D. 1891, the said defendant made the preliminary survey of a line of route for a railway across the land in question. Thereafter, and between the 9th and 13th days of May, A. D. 1892, the said defendant made a second survey of a line of route across said land, which line differed in location to a distance of 600 or 700 feet from the line of its preliminary survey. A plat or profile of the line of route across said land surveyed between the 9th and 13th days of May, A. D. 1892, was prepared by said defendant, and on the 17th day of June, A. D. 1892, the line of route shown by said plat or profile was adopted by resolution of the Board of Directors of said defendant. Said plat or profile was verified by the chief engineer of said defendant on the 12th day of July, A. D. 1892, and was thereafter on the 20th day of July, 1892, filed with the register of the District Land Office at Fargo, North Dakota. On the 14th day of October, A. D. 1892, the said plat or profile of the section of defendant's railway extending across said land, was approved by the Secretary of the Interior. The preparation and filing by said defendant of copies of its articles of in-
86 corporation and proofs of its organization under the same, and the preparation, adoption, filing and approval by the Secretary of the Interior of the plat or profile of that section of its railroad extending across the land in question and all said acts, were done or procured to be done by said defendant for the purpose of securing a right of way across the public lands of the United States

before and in anticipation of the construction of its railroad, under and by virtue of the provisions of an Act of Congress, approved March 3, 1875.

III.

At the time of plaintiff's settlement upon the land in question, the railroad of defendant had not been in any part constructed thereon, or the ground graded or in any manner broken or prepared for such construction thereon, and the only mark or indication of the survey made across it, was a row of stakes marking the center line of the route chosen by said defendant for its railway. The plaintiff at the time of making his said entry upon said land and at the time of his settlement thereon, on or about July 1, 1892, did not know of the row of stakes across said land marking the line of route chosen by said defendant and did not know that a survey had been made or a line of route marked out by stakes or in any way indicated by said defendant across said land in the location upon which said defendant railway was afterward constructed. The line of defendant's preliminary survey at a distance of 600 or 700 feet from that
87 upon which the railroad was afterward constructed, was called to the attention of said plaintiff on or about the 27th day of June, A. D. 1892. During the latter part of the month of July and the month of August in the year 1892, the said defendant constructed a railway across the said land entered and settled upon by plaintiff as aforesaid, upon the line of route surveyed by defendant between the 9th and 13th days of May, 1892, and shown upon the plat or profile of that section of railroad prepared by said defendant, adopted by it as its line of route and filed in the United States District Land Office at Fargo, North Dakota, on the 20th day of July, A. D. 1892. From the time of the construction of said line of railway across said land until the present, the said defendant has occupied, used and claimed as its right of way across said premises, a strip of land 200 feet in width, being 100 feet on either side of said center line of its said railroad in the location aforesaid, and has exercised all the powers of ownership over the same. The said defendant has not at any time instituted proceedings under State or Federal laws to condemn said strip of land 200 feet in width across the said land to its use for railway purposes or for any purpose, and has not at any time acquired any right or title to said strip of land or to the use thereof other than such as may have been acquired by it through attempted compliance before and in anticipation of the construction of its railroad with the provisions of said Act of Congress approved March 3, 1875.

88 IV.

In taking and using said strip of land for the purpose of a right of way of its railroad, the said defendant has caused ditches to be dug and an embankment of earth varying in height from 4 to 6 feet, to be thrown up diagonally across said land from side to side and has placed on said embankment ties and iron rails and has at all times from said taking to the present, used the same for railway pur-

poses, causing trains of cars, operated and driven by steam engines, to pass over the same and across said land daily. By such taking and use the said premises have been cut and divided into many three cornered tracks and irregular shaped pieces and the value and convenience of the same for farming purposes greatly depreciated. About 13 acres of said land have been included in the said strip 200 feet in width used by said defendant as its right of way, and the plaintiff has been and is prevented from any use whatever of said part. Crops grown or buildings placed upon said land will be, by the use of said strip for railroad purposes, subjected to increased hazard of loss by fire. By reason of such taking and use, the premises have been depreciated in value and the plaintiff has sustained loss and damage in the sum of $1,000.

V.

After his said entry upon said land and his settlement thereon about the first day of July, A. D. 1892, as aforesaid, the said plaintiff resided upon and cultivated the same and fully complied
89 with the laws of the United States relative to public lands taken and claimed by settlers under the homestead law, and on or about the 4th day of November, A. D. 1899, having made proof of his claim to said land as required by law, received from the United States a patent conveying to and vesting in him full and absolute title in fee simple to the said land without reservation of any right, claim or title in or to the said defendant for the use of any part of said land for the purpose of a right of way for a railroad, or for any purpose.

VI.

The plaintiff has not at any time consented to the taking and use of the said strip, 200 feet wide across the land hereinbefore described or its use by said defendant for railroad purposes and has not at any time, or in any manner granted to said defendant leave, license or authority to enter upon or use any part of said land for any purpose; and has not at any time received from said defendant any compensation for the taking and use of said land as aforesaid, and the injury and damage caused said plaintiff thereby.

Therefore, from the Findings of Fact aforesaid, the Court deduces the following:

Conclusions of Law.

I.

The plaintiff, Thomas Doughty, is the owner in absolute fee simple of the said land hereinbefore described, without reservation
90 to the defendant of any claim, right, title or estate therein, and his title relates back to July 1, 1892, the date of his settlement thereon.

II.

The defendant having attempted to acquire a right of way across said land before and in anticipation of the construction of its rail-

road in compliance with the provisions of Section 4 of the Act of Congress, approved March 3, 1875, the filing with the Register of the District Land Office, and approval by the Secretary of the Interior of the plat or profile of the section of its railroad extending across said land, was a condition precedent to the acquisition or claim on its part to right of way, and any title, estate or interest acquired by it in or to said land dates from said filing and approval.

III.

At the date of the filing by the defendant with the Register of the United States Land Office, for the district in which said land was situated, of its plat or profile of the section of its railroad extending across said land, the plaintiff had entered, settled upon and acquired a possessory interest in said land, which afterwards ripened into title, and the said defendant, in taking its right of way across said land, took subject to the prior claim and interest of the plaintiff.

IV.

The defendant has never acquired and has not any vested or accrued interest, claim, right or title to the strip of land now
91 used by it for right of way across said premises, or to the use of it for any purpose.

V.

The plaintiff is entitled to judgment against the said defendant for the sum of $1,000 as compensation for the damage and injury sustained by him through the unauthorized appropriation and use by said defendant of its right of way and railroad across said land in the location hereinbefore described.

Let the clerk of this Court enter a judgment in favor of plaintiff, Thomas Doughty, and against the defendant, The Minneapolis, Saint Paul & Sault Sainte Marie Railway Company, in the sum of $1,000, and for the taxable costs of this action, and let said judgment provide that upon payment to the plaintiff, by defendant, of said sum of $1,000, with interest accrued upon the same, and the costs of said action, there shall vest in the said defendant, and its successors and assigns, the full legal title to that portion of the said East half (E. ½) of the southwest quarter (S.W. ¼) and lots three (3) and four (4) in Section eighteen (18), Township one hundred forty-six (146), North of Range sixty-six (66), west of the fifth principal meridian, by it appropriated and used as a right of way for its railroad, to-wit: a strip of land one hundred (100) feet on each side of the central line of defendant's railroad as the same has been here-
heretofore constructed, and is now located and operating
92 through and over said premises.

Dated June 3rd, 1905.

By the Court,

EDWARD T. BURKE,
Judge of the said District Court.

Judgment.

The above entitled cause came regularly on for trial at a special term of the District Court aforesaid, held in and for the County of Foster and State of North Dakota, on the 13th day of May, A. D. 1905, and was tried before the Court without a jury, a jury having been expressly waived by agreement of parties, the plaintiff appearing in person and by S. E. Ellsworth, his attorney, and the defendant appearing by Alfred H. Bright, its attorney. Thereupon evidence was introduced by and on behalf of both plaintiff and defendant and the Court having duly considered the testimony offered as aforesaid and the oral arguments of counsel for both parties, and written briefs filed on behalf of both plaintiff and defendant and being fully advised in the premises and having made and filed herein its Findings of Fact, Conclusions of Law and Order for Judgment thereon.

Now, therefore, on said Findings of Fact, Conclusions of
93 Law and on the Order for Judgment made by the Court June 3, 1905, and herein entered and on motion of S. E. Ellsworth, attorney for the plaintiff herein,

It is ordered and adjudged that the plaintiff, Thomas Doughty, have and recover of the defendant, The Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, the sum of One Thousand Dollars ($1,000) and his costs of this action in the further sum of $58.10 to be taxed according to law and when so taxed to be inserted herein; and

It is further ordered, adjudged and agreed that on the payment by said defendant to said plaintiff of the said sum One Thousand Dollars ($1,000) with any interest accrued to the date of such payment, and of costs of this action, there shall vest in the said defendant and its successors and assigns the full legal title to that portion of the said east half of the southwest quarter (E. ½, S.W. ¼) lots three (3) and four (4) in Section eighteen (18), Township one hundred and forty-six (146), North of Range sixty-six (66), west of the fifth principal meridian by it appropriated and used as a right of way for its railroad, to-wit: A strip of land 100 feet on each side of the center line of defendant's railroad as the same has been heretofore constructed and is now located and operated through and over said premises.

Witness, Hon. Edward T. Burke, Judge of the District Court of the Fifth Judicial District of the State of North Dakota and
94 the seal of said Court this 6th day of June, A. D. 1905.

T. M. PAGE,
Clerk of the District Court.

Notice of Appeal.

To the above named plaintiff and to S. E. Ellsworth, Esq., his attorney:

You will please take notice, that the defendant does hereby appeal to the Supreme Court of the State of North Dakota from the judg-

ment heretofore and on the 6th day of June, A. D. 1905, entered in the above entitled cause in favor of the plaintiff and against the defendant for damages One Thousand Dollars ($1,000) and costs, Fifty-eight & 10-100 Dollars ($58.10), in all One Thousand Fifty-eight and 10-100 Dollars ($1,058.10). Said appeal is taken from the District Court of Foster County, N. D., to the Supreme Court of the State of North Dakota, and is from the whole of said judgment.

Dated January 18th, A. D. 1906.

L. W. GAMMONS &
F. BALDWIN,
ALFRED H. BRIGHT,
Attorneys for Defendant.

A supersedeas bond was filed.

[Endorsed:] 364, 20,329, Sept. 14, '06.

95 [Endorsed:] File No. 20,329. Supreme Court U. S. October Term, 1906. Term No. 364. The Minneapolis, St. Paul & Sault Ste. Marie Railway Co. Pl'ff in Error, *vs.* Thomas Doughty. Stipulation in relation to printing record. Filed Sept. 14", 1906.

Endorsed on cover: File No. 20,329. North Dakota Supreme Court. Term No. 81. The Minneapolis, St. Paul and Sault Ste. Marie Railway Company, plaintiff in error, *vs.* Thomas Doughty. Filed August 10, 1906. File No. 20,329.

Supreme Court of the United States.

THE MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAILWAY COMPANY,

Plaintiff in Error,

vs.

THOMAS DOUGHTY.

Brief for Plaintiff in Error.

STATEMENT.

This is an appeal from the judgment of the Supreme Court of North Dakota, awarding damages to the defendant in error for a parcel of land occupied and claimed by the plaintiff in error as its right of way near the village of Carrington, N. D.

The railway company claims under the act of Congress of March 3rd, 1875, granting the right of way to railroads over the public lands of the United States. The act is as follows:

> "Be it enacted, &c., That the right of way through the public lands of the United States is hereby granted to any railroad company

duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

Sec. 2. "That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road; Provided, That such expenses shall be equitably divided between any

number of railroad companies occupying and using the same canyon, pass, or defile."

Sec. 3. "That the legislature of the proper Territory many provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled, 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

Sec. 4. "That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Sec. 5. "That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipula-

tion or by act of Congress heretofore passed."

Sec. 6. "That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof."

The defendant qualified as a grantee under this act in the spring of 1891. In May, 1892, it located its line of railway across the land in question, then being vacant and unoccupied Government land. This location was by survey and stakes, the engineer's record of which would be shown by his field notes. This is the way all railroads are located.

Afterwards, on June 17th, 1892, the line as located was adopted by resolution of the directors, and this was followed up by construction of the railway across said land in the months of July and August, 1892. On the 20th of July, 1892, the company filed the plat or profile of its line of route, on which the road was built and which had been before made in the month of May, with the Register of the United States Land Office at Fargo, N. D., which plat was approved by the Secretary of the Interior, October 14th, 1892.

On the 25th day of June, 1892, the plaintiff Doughty made a homestead entry on this land, and established his residence thereon July 1st, 1892, and thereafter perfected his title and obtained a patent therefor November 4th, 1899.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectfully submits that the Supreme Court of the State of North Dakota erred in this:

1. The court erred in holding that the filing of the plat and the approval thereof by the Secretary of the Interior were conditions precedent to the acquisition of right of way under the Act of March 3, 1875.

2. The court erred in holding that the homestead entry made by the defendant in error subsequent to the definite location of the railway of plaintiff in error, but before the filing and approval of the plat showing such location, gave to defendant in error priority of right as to said right of way.

3. The court erred in holding that the plaintiff in error had not at the time of said homestead entry, any vested or accrued interest, claim, right or title to the strip of land used by it as a right of way across the tract of land entered by the defendant in error as a homestead.

4. The court erred in sustaining the judgment against the plaintiff in error and in favor of the defendant in error for one thousand dollars ($1000) damages on account of the appropriation and use of the right of way claimed by the plaintiff in error under and by virtue of the Act of Congress of March 3, 1875, granting right of way over public lands to railways.

ARGUMENT.

The assignment of errors raises the single question whether the homestead entry and residence made by the defendant in error intervening between the location of the railway company's road across said land and the filing and approval of its map, should be held to deprive the railway company of all benefits under the Act of Congress.

In some of the land grants to aid in building railways there was a separate grant of right of way which was held to be a grant *in praesenti*, giving title as of the date of the grant the moment the line was located. All intervening rights by preemption or homestead were cut out (*R. R. Co. v. Baldwin*, 103 U. S. 426).

In fact, any right whenever initiated which at the time of the grant had not become vested as against an act of Congress, was cut out.

In the Baldwin case this seeming injustice was justified on the grounds of public policy because Congress wanted the railroads. And it was important to assure them, so far as possible, free right of way.

In the case of the land grants, if settlements existed they were protected and the companies lost nothing. They were indemnified by other lands. It is plain, however, that other right of way could not be granted as indemnity, since the right of way could not be movable in the very nature of things.

By the act of March 3rd, 1875, immediately after the grant, which is in terms *in praesenti* the

same as the others, Congress provided that the companies must make compensation for possessory interests of settlers upon public lands over which their lines were located. It seems consonant with the general purposes of the act to say that those in possession at the time the company located its road under the grant as to any particular land should be protected, thereby giving full play to the familiar doctrine that the first in time in the commencement of proceedings for the acquisition of title, when the same is regularly followed up, is deemed to be the first in right.

Shepley v. Cowan, 91 U. S. 338.
Steere v. Buck, 133 U. S. 550.

This view is strengthened by the second section which places a limitation upon the right of a railway first locating its line through a canyon. Its right there shall not be exclusive by reason of its being first in time. Thus it is clearly shown that it is the *location* and not the map which indicates right under this act.

It might be urged on the strength of the Baldwin case that this act is *in praesenti* as of the date when the railway company becomes a grantee by filing its articles and due proofs with the Secretary of the Interior; that this is the commencement of the proceedings to acquire the title which being followed up by the location, filing of map, etc., gives it precedence over all rights initiated after the filing of the articles and due proofs, that by the doctrine of the Baldwin case the approval of the map relates back

to the date of the filing of the articles and cuts out all intervening possessory claims. But it is not necessary to go so far. It is probably a sounder view to say that it was the intention of Congress to protect the company as well as the settler from time of entry; in the case of the settler to make his settlement and of the railway company to locate its line. It is assumed by Congress that the company must of necessity locate its line before it could make a filing or build its railway, and that to do this it must have the right to enter and take possession of the land. And it is to be noted that everything is reckoned from this act—the time within which it shall file its map and the time within which it must build its road. It is also plain that the right to take materials and acquire extra ground for station purposes is dependent upon the location of the road, because they must be taken adjacent to the right of way. And the right of way could only be determined by the location of the road.

It is self-evident also that the only location mentioned in the act does not depend on the map, that is to say, is not made by the map, because the map follows the location of necessity. It is therefore more than idle to assert contrary to the law of Congress that the line is only located, or definitely located, as said by some, by the map. The map is simply the evidence of the location made as all locations are made, and may be built upon before the map is approved, or even filed, as in the case of *Jamestown & Northern v. Jones*, 177 U. S. 125.

It therefore follows as a certain conclusion that

when the company locates its line it has begun proceedings to acquire the title, which, if regularly followed up makes it the first in right as to any unoccupied government land. This view is strongly supported by the second section of the act and by the decision of the Supreme Court of the United States in *Railroad v. Alling*, 99 U. S. 463.

As to the canyon it is to be observed that Congress provides a use in common by other railroads "*with the railroad first located.*" It does not say with the road which shall first file its map and get it approved. The initiation of the right under this act is clearly the *location of the road* referred to in terms by the act and which precede the map.

It appears from the facts found in this case that the location of this railway was made across the land in question before the plaintiff began his proceedings to acquire the title, and the railway company was lawfully on that land and was authorized to build its railway there. *The time within which it might build it, as we have before said, was reckoned from the location.* There can in the law be no separation between the act of location and the act of building. One is authorized as much as the other and in the same provisions of the act. Therefore, the company not being in any particular in default it was not and could not become a trespasser, either as to the Government or as to the plaintiff. It would be absurd to say it was both lawful and unlawful to build a road. And yet this company is mulcted in heavy damages as for an unlawful invasion of Mr. Doughty's property rights in-

tervening, as he alleges, between the location and the building of the road, although the thing charged is the very thing that Congress expected and invited, and to accomplish which the Congress gave the long period of five years from the act of location, not from the time of the approval of the map. There was a distinct invitation in this law to build at any time after the location within the five year period. And the sooner, of course, the building took place, the better satisfied the Congress would be. But by this judgment we are held virtually to be trespassers, because we built this railway across this land which we had lawfully taken possession of for the very purpose of locating and building the road under this grant.

The entry of the defendant in locating its line was lawful. Its possession was within the strict rights granted by the statute. It invaded no right of the plaintiff, nor committed any trespass as to him. The land was vacant. The company has ever since remained in possession. When did it become a trespasser? When was its lawful occupancy turned into an unlawful possession, a trespass?

But it will doubtless be said, as it has been said before, that no right was secured prior to the filing and approval of the map, which were after the filing and settlement of Doughty. In answer to this it is to be observed that *Congress gave the company twelve months after the location within which to make its filing, just as it gave Doughty thirty days within which to make his filing after settlement, if he had first made his settlement.* But his *settle-*

ment meanwhile would have protected him during the time allowed for making his filing. And I submit that the *location of the railroad was intended by Congress to protect it during the time allowed for the filing of its profile or plat.* Nothing else can be made out of this language.

Analogy Between the Right of Way Act and the Preemption and Homestead Laws.

This right of way act in some important features bears strong resemblance to the provisions of the preemption law, found in Revised Statutes of the United States, Section 2259, *et sec.* The preemption law defined the persons who are entitled to enter land under that act, and provided that when any person had settled or improved a tract of land and intended to purchase the same under that law, he should, within thirty days after such settlement, file with the Register of the proper land district his declaratory statement and should make his final proof within twelve months after such settlement on surveyed lands. On unsurveyed lands the settler was allowed three months after the plat of the survey was filed in the proper land office, within which to file his declaratory statement, and thirty-three months after the filing of said survey within which to make his final proof. The right of way act first defines the railway companies to which the grant is made, and in Section 4 uses this language:

> "That any railroad company desiring to secure the benefits of this act, shall, within twelve

> months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the Register of the land office for the district where such land is located, a profile of its road."

If the settler failed to do the things required of him within the time limited, he forfeited his right. So if the railroad company failed to do the things required of it within the prescribed time it forfeited its rights under this grant. In the case of the preemption law, the *settlement set the time running within which the required filing and proof should be made.* In the right of way act the *location of the railway* sets the time running *within which the map or profile of the located line should be filed and the road built.* It has been uniformly held by the courts that the right of the preemptor was initiated by the settlement, and that he was protected to the end of the time prescribed for the performance of the conditions imposed against all those whose settlement was later in time. No one could defeat this right except Congress, provided he duly performed the conditions which the law imposed upon him. The language *"shall, within thirty days, file"* etc., *did not merely set a limit within which to file, but also created a privilege, a time of grace, within which to do that which the law required, and granted immunity to the settler against all who should seek to appropriate the land within that time.* The homestead law, as it was amended on May 14th, 1880, had similar provisions protecting the settler

from the time of his settlement the same as the law had theretofore protected the preemptor.

It is not permissable to assume that Congress used this language in the right of way act inadvertently or without purpose. If the intention had been to postpone the initiation of the railway company's title to the date of the approval of the map by the Secretary of the Interior, it is hardly conceivable that Congress would have used language which had a totally different effect in the preemption and homestead laws.

But, it will be said, as was said in the case of *Jamestown & Northern v. Jones* by Mr. Justice Corliss (7 N. D. 619), that by implication growing out of the language of the act beginning "thereafter all such lands shall be disposed of subject to such right of way," it was intended that no right should attach until the map was filed. But in order to give this language the force claimed for it, it is necessary to nullify the plain meaning of the language already considered, which grants to the railway company the immunity within the time granted by Congress for the preparation, filing and approval of its map. And it is the settled doctrine of the Supreme Court of the United States, and of all courts I believe, that the repeal or nullifying of the clear provisions of the statute by implication is not favored. To put this construction upon the language relied on would also lead to inconsistency in the statute, if not absurdity, because it is perfectly plain that if a railroad line was located over unsurveyed lands, all of the right of way and other bene-

fits could be absorbed by settlers, who should make their settlements before it was in the range of possibility for the railroad to protect itself by an approved map and before the railroad could be constructed. Thus, a railroad company in good faith locating its line in sections of twenty miles, and proceeding to build its road, would have no benefit whatever under the grant, *which provides that the one thing which it is required to do may be done by it within twelve months after the survey of the land by the government.* I cannot see anything but absurdity in such a result, nor any escape from the impression of a gross inconsistency. The difficulty arises from a too rigid and literal or verbal construction; that the word "thereafter" means only after the last act recited has been done. Whereas, it is perfectly legitimate to consider that the term "thereafter" applies to the first thing which the railroad company was required to do, to-wit: the location of its road. That it refers to the whole group of acts for securing the title, and that by the doctrine of relation when the map is approved the title vests in the railway company as of the date of the location of its road. This is doubtless the rule which was always applied to preemptors when they proved up and received their patent. It is the rule also applied by the Supreme Court of the United States in some of the railway land grants.

St. Paul &c. Ry. v. W. & St. P. Ry., 112 U. S. 720.

Sioux City &c. Ry. v. C. M. & St. P., 117 U. S. 406.

and it was applied in *U. S. v. Alling, supra.*

See also *U. S. v. Detroit Lumber Co.*, 200 U. S. 321, 334.

The provision in the homestead law, Section 3 of the Act of May 14th, 1880, that any settler on the public lands, surveyed or unsurveyed, whose intention is to claim the same under the homestead laws, should be allowed the same time to file his homestead application and perfect his original entry, as was then allowed to settlers under the preemption laws to put their claims on record and that his right shall relate back to the date of settlement the same as if he settled under the preemption laws, is but declaring what the court would have found as a sound principle of equity without any statute.

The construction of this statute, for which I contend, invokes the doctrine of relation from the approval of the map to the inception of the equitable title of the railway company, at least as early as the 17th day of June. This construction is supported by the Supreme Court of Missouri in the case of *Kinion v. Railway Co.*, 118 Mo. 577; 24 S. W. 636; by the Supreme Court of Colorado in *Denver & Rio Grande R. R. Co. v. Hanoum*, 19 Col. 162; 34 Pac. 838, and by the Supreme Court of Utah in *Lewis v. Ry.*, 54 Pac. 981.

I am well aware that there are contrary decisions and that the Supreme Court of North Dakota in the case of *Jamestown & Northern v. Jones*, 7 N.

D. 619, took a contrary view. In most of the cases, however, the language relied on by the plaintiff was purely *obiter*. That is strikingly so in the case of *Red River &c. v. Sture*, 20 N. W. 229; 32 Minn. 95.

The land in question was settled by Sture in 1879, and the company was not organized until 1882 and was not claiming under the act of 1875 at all, but under section 2477 of the Revised Statutes of the United States granting right of way for the construction of highways over the public lands. This decision is not authority on any question except that the act of 1875 superseded and necessarily repealed the section relied on. It may be that the language used by Mr. Justice Mitchell suggests the construction claimed by plaintiff's counsel here as to when the company's rights attached, but in view of the fact that it is purely *obiter* and on a point not involved and quite clearly not argued, and with no consideration given to the powerful reasons against such construction, it can have little weight although given by a judge of admitted ability and learning.

In *Spokane &c. Co. v. Zeigler*, 61 Fed. 392, Mr. Justice McKenna, speaking for the Circuit Court of Appeals, uses the expression, "Its right attached upon filing a profile of its road as provided in section 4." It will be noted that this does not agree with the position taken by plaintiff's counsel, because he says that it is only upon the approval of the map which might be months after the filing, as it often was. But no great weight should be at-

tached to this for any purpose because the question here presented was not involved, nor did the facts demand a discussion of it. The construction of section 3 alone was involved and the decision of the Supreme Court in the same case is confined to that.

In the Zeigler case the facts showed that he was the first in time in making a settlement and his rights were protected by section 3 of the act. He was there before the company organized, certainly before its articles were filed. This case well illustrates what Congress had in mind. By the provision of section 3 it meant to protect the valid settlers whose lands, while still public lands within the decisions of the Supreme Court, should be crossed by the railway.

In *Lilenthal v. So. Cal. Ry. Co.*, 56 Fed. 701, while there are some things said by Judge Ross which go to uphold the position taken by counsel, yet the case was dealing with station grounds which the company attempted to appropriate before it had located its line. And since the grant itself gave the station grounds adjacent to the right of way, it was rightly held that the right of way must be located before station grounds could be acquired. This seems to me to be the sum and substance of this decision and whatever else the judge may have said is not entitled to any consideration as authority.

Now the same must be said of *Larson v. Oregon Co.*, 23 Pac. 974. This case depended entirely upon section 3. Larson was rightfully on the land be-

fore the company was there and it does not appear that the railroad company had qualified under the act by filing its articles.

Hamilton v. Spokane &c., 28 Pac. 408, involves another point, altogether, since the map was filed and approved before the settlement under which the plaintiff claimed. The question was whether the tract was public land when occupied by the railroad company, because of certain filings which had been made, but were afterwards relinquished. On this point the decision is valuable, but as to whether the company had a valid right when its line was located and before its map was filed it is not an authority, although the opinion says that the grant took effect from the date of the approval of the map. Here we see how radically different the view from that expressed by Justice McKenna in the Zeigler case. Both are, however, of equal value in this, that they are *obiter*.

In *Enoch v. Spokane &c.*, 33 Pac. 966, the settler's right intervened between the filing of the articles and the construction of the road. It does not appear when the line was located, nor was any right predicated on that, but upon the filing of the articles. This case is an authority that the right secured by filing and approval of the map does not relate back to the filing of the articles. And the opinion holds that the company's right first attached when its map was filed and approved. Now, in that case the approval was in the fall or early winter of 1889, but the road was constructed in June

and July. It is very important to note that the question which is presented here for decision was not involved in that case. It might have been resident in the facts, but they are not made to appear because the date of location from which the map was made is not disclosed.

In the case of *Denver &c. v. Wilson*, 62 Pac. 843, it was contended that the right of the railroad related back to the date of the act itself and cut out the rights of the settler, who was there long before the railroad entered upon the land. There was an effort of course to evade the provision of section 3 of the act of 1875, which had already been construed by the Supreme Court of the United States in the Osborne case (106 U. S.).

When we have carefully read and considered all these various opinions, and whether delivered by judges on questions not involved in the issues, or by the officers of the Land Department, we shall find that they are in their broad scope in clear and unmistakable conflict with the fundamental principle on which the Jones case is decided by the Supreme Court of the United States.

Jamestown & Northern v. Jones, 177 U. S. 125.

The whole force of the authorities rests upon the hard and fast proposition that no railroad company under this act could get any right in the land until its map was approved. The Land Department went so far as to say that a railroad company could not enter upon the public lands at all for any purpose, except to run its line, until the last thing re-

quired to be done under the act had been done. In the case of unsurveyed land, a railroad company locating its line must wait, according to this view, until the land is surveyed, maybe five years hence, before it can enter upon the ground to construct its road. And by the act itself it would forfeit all rights, for it is provided that the rights granted shall be forfeited as to any section of road not completed within five years after the *location* of said section. It is interesting to note that Congress uses the same word here that is used in the first part of section four, in fixing the time within which the map shall be filed, "within twelve months after the *location* of any section."

Counsel quotes from the opinion of the land office as to fixity of location, but Congress did not say anything about *fixity* of location. Everything in this act is dated from the "location" which precedes the making of the map. If the line were located January 1, 1880, and the map filed and approved January 1, 1881, when would the five year period, within which the railroad must be built, begin to run? I do not think that it is open to question that it would begin to run from the location referred to in the first part of section 4. And that is precisely the same location referred to in the proviso. But how can the period of limitation on the construction of the road be considered to run from a time before the railroad company's right attached? By the decisions which are relied on it had no right to begin the construction of the road until a map had been approved.

It is to be noted, however, that the authority of *Jamestown & Northern v. Jones* rests upon the proposition that the right of way may be definitely located before a map is filed, or without any map at all. As Mr. Justice McKenna says, "the state court decided that the right of way only became definitely located by the filing of a profile of the road. The contention of the plaintiff in error is that the right of way may be definitely located by the actual construction of the road."

Now, Congress has said that the *location which it required* could exist without either the map or the constructed road. *And it is the only location referred to in the act.* It may be conceded, as stated by the Supreme Court in the Jones case, that there is some uncertainty in this act, but there is no insuperable difficulty if due weight is given to every provision in the act and all are construed together for the purpose of ascertaining the true intent and purpose of the Congress. It is no disrespect to the learned judges and courts involved in the decisions cited by plaintiff's counsel to say that their conclusions were reached from a partial view and upon very important questions not involved. It is no disparagement to even a learned judge to say that his off-hand views with respect to an important question that has not been discussed by counsel ought not to be received as authority. It is, I submit, of no more consequence than is the opinion of any able lawyer in disposing of questions of great importance without due regard to very important considerations to the contrary, which were not re-

ferred to, and therefore it may be assumed, not considered.

The decision of this court in *Jamestown & Northern v. Jones*, 177 U. S. 125 has overthrown some of these decisions and gone a long way toward destroying them all as authority as to the proper construction of this statute.

EFFECT OF DECISION IN JAMESTOWN & NORTHERN R. R. CO. V. JONES AS AN AUTHORITY AGAINST THE CONCLUSION CONTENDED FOR BY PLAINTIFF IN ERROR.

The decision of the Supreme Court of North Dakota here being reviewed was in accordance with the understanding of that court as to the effect of the decision of this court in *Jamestown & Northern v. Jones*, as appears from the opinion. The court says:

> "This court held in *Jamestown & Northern Ry. Co. v. Jones*, 7 N. D. 619, that the benefits of this act of 1875 could be acquired only by compliance with all the conditions imposed by Sec. 4 of that act; and that a settlement upon the land by a claimant under the Federal Land Laws after the construction of the road, but before approval of the map of definite location, defeated the company's acquisition of a free right of way under the act, as against the settler in possession. That decision was reversed by the United States Supreme Court in *Jamestown & Northern Railway Co. v. Jones*, 177 U. S. 125. That court held that the grant took effect when a grantee qualified to take, had definitely located the right of way claimed under the grant. It was held that the actual construction of the road constituted such definite location.
>
> "In the case at bar, the actual work of con-

struction was not begun until after plaintiff's possessory rights accrued. Consequently if actual construction is the first act, sufficiently identifying the definite location of the right of way, then the judgment must be affirmed because the decision of the United States Supreme Court in the Jamestown and Northern case, clearly established that the grant takes effect from the date of the definite location and not before.

"To the same effect is also the decision in *Washington & I. Railway Co. v. Osborne*, 160 U. S. 103. Appellant contends that the final survey definitely locating the right of way is an act on the part of the company, which, when promptly followed up by actual construction, is sufficient to constitute a definite location. The argument appeals to us with much force. The necessary inference from the language used by Mr. Justice McKenna, however, in the Jamestown & Northern case, is, it seems to us, that actual construction is the only sufficient act, other than complaince with Section 4, to constitute a definite location, and the right of way does not exist before actual construction unless the company's profile map has been approved by the secretary, before the settler's rights attached.

"That decision is conclusive upon us and it would be neither proper nor profitable for this court to set forth its own views as to whether or not the language used in that decision ought to be modified. The judgment appealed from must, therefore, be affirmed. All concur."

I think I am warranted in saying that but for this view as to the scope of the decision of this court in that case, the judgment in the case at bar would have been reversed by the Supreme Court of North Dakota. With due deference to the Supreme Court of North Dakota I cannot assent to its view

as to the force of the decision of this court because it carries that decision beyond the facts involved. It cannot be supposed that this court intended to decide not only the case before it but also a case not before it and presumably not argued.

Jamestown & Northern Ry. Co. had constructed its road and filed its articles when Jones settled. Jones claimed that it took nothing by the grant because the map or profile of its road had not been filed and approved by the secretary of the interior when he settled. This court overruled this contention and held that the filing and approval of a map under the facts presented was unnecessary; that the title under the grant was perfected by the acts already done at the time Jones settled. It was held that Section 4 was not applicable to the facts of that case. It follows, therefore, that no construction of its provisions was required and it is respectfully submitted that none was intended.

The case presented here, however, does require the construction of that section, and if there is anything in the opinion of this court in the Jones case which should justly embarrass the Supreme Court of North Dakota and constrain its judgment in respect to the proper construction of the statute on the facts presented here, the plaintiff in error respectfully asks that it be permitted the liberty of a free and full discussion as to the proper construction of this act of congress un-embarrassed by the decision in the case of *Jamestown & Northern Ry. Co. v. Jones.*

It is proper to say in this connection that the

plaintiff in error does not propose to challenge the decision that the railway company had a title superior of that of Jones. There is no doubt that within the construction of this statute for which it contends, the title of the railway company to the right of way appropriated was unaffected by the homestead entry of Jones.

THE PROPER CONSTRUCTION OF THE ACT OF MARCH 3RD, 1875.

If I were permitted to speak freely concerning the construction of this act and of the decision of your honors in the case of *Jamestown & Northern Ry Co. v. Jones*, I should say that the reversal of the Supreme Court of North Dakota in that case was right, but that it was based upon an erroneous construction of this act of congress borrowed from the decision of the secretary of the interior in *Dakota Central Ry. Co. v. Downey*, 8 Land Decisions, 115.

It must be conceded that the congress had the absolute power to give or withhold the grant covered by this act and therefore had exclusive authority to fix the conditions upon which it should be enjoyed. It has done that in all of the land grants to aid in the construction of railways by provisions similar to those of the grant involved in *Railroad Co. v. Baldwin*, 103 U. S. 426. The first section of that act provided as follows:

> "Be it enacted, etc., that there is hereby granted to the State of Kansas for the use and

benefit of the St. Joseph & Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly via Maryville, in the same state, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not farther west than the one hundredth meridian of west longtitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections, or parts of sections designated by odd numbers as shall be equal to such lands, as the United States have sold, reserved or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid, which lands, thus indicated by odd numbers and selected by direction of the secretary of the interior as aforesaid, shall be held by the state of Kansas for the use and purpose aforesaid."

The fourth section is as follows:

"That as soon as the said company shall file with the secretary of the interior maps of its line designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the

purposes of this act and subserve the public interest."

Reading these two sections together it becomes very apparent that the only method by which the line of the road could be definitely fixed was by filing with the secretary of the interior maps of its line designating the route thereof and that the lands were open to pre-emption or homestead settlement until that was done. And it has been held in similar cases that the company's right to any particular section of land did not attach and could not attach until the filing of the map, and the reasons for these limitations upon the grant in favor of settlers is clearly stated by Mr. Justice Fields in the Baldwin case.

These provisions were definitely construed in favor of a homestead settlement in *Kansas Pacific Ry. Co. v. Dunmeyer,* 113 U. S. 629. It would be worse than useless for a railway company which had constructed a section of its railway after such a grant, but before it had filed with the secretary of the interior its map as provided in Section 4, to claim title to lands on either side of the constructed road against settlements made by pre-emptors and homesteaders after the building of the road, but before the filing of the map. But every argument exists in favor of such a contention that was urged by Mr. Secretary Vilas in *Dakota Central R. R. v. Downey.* Wouldn't the building of the road in such a case give as much fixity to the location as under the right of way act? The answer

to such reasoning would be that the congress has declared upon what conditions the title of the railway company shall attach and the grant become effective, and it is not permissable for any other authority to change or add to or detract from those conditions.

The act of March 3rd, 1875, is just as explicit as to what should be done to secure the benefits of the grant as is the statute quoted. In legal effect it is the same as if the first section had read as follows:

> "Be it enacted, etc., that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, to the extent of one hundred feet on each side of the center line of said road, etc."

omitting the words

> "which shall have filed with the secretary of the interior a copy of its articles of incorporation and due proof of its organization under the same,"

and had included said clause in Section 4 so that it should read as follows:

> "Section 4. That any railroad company desiring to secure the benefits of this act shall file with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same and shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the reg-

ister of the land office for the district where such land is located a profile of its road, etc."

Judicially construed, that is precisely what this act as it reads in the statutes means. Was it necessary that the Jamestown & Northern Ry. Co. should have filed its articles of incorporation and due proofs before Jones made his settlement? That certainly could not be denied, but it was also just as incumbent upon it that it should within twelve months after its location file a map as required by the statute. But it might be said that this could not be done because its line was located in October, 1881, and its articles were not filed until the 26th day of January, 1883. The answer to that is that so far as this act is concerned the location would be considered as made on the day upon which it filed its articles, for that was the time it first became a qualified grantee under the act. That company recognied its duty and obligations under the statute because on the 13th of March, a little more than a month after it filed its articles, a map of definite location was filed and approved by the secretary of the interior. Upon this view, that company, which up to the 26th day of January, 1883, had been a trespasser upon the public domain in locating and constructing its line thereon without any compliance with the law, occupied precisely the same relation towards the homestead entry of Jones that the plaintiff in error here occupies toward Doughty, and unless we read something into this statute which is not there, it could only maintain its claim to right of way upon

the same construction of the statute as that for which the plaintiff in error contends.

It has been argued in the first part of this brief that the location of the road was the act by which the Company's right was initiated as to any particular tract of land. It is clear that the location referred to in the act of Congress was a location to be made by a Railway Company which had qualified as a grantee, that is, a duly organized company which had filed with the Secretary of the Interior a copy of its Articles with due proofs of its organization.

In order to test the soundness of the construction followed by the Supreme Court of North Dakota, let it be assumed that a company which had duly qualified itself as a grantee under this act desired to build a railway over unsurveyed lands of the United States, where it could not build without the use of timber, materials, etc., from lands adjacent to the right of way. It locates a section of twenty miles of road, which it has a perfect right to do within the clear meaning of the statute. But it can file no map within the requirements of this act and the rules and regulations of the land department for its administration, and it is not expected to file any map until after the government survey. The rules and regulations require the map to show a location by government subdivisions and to be tied to government corners with great particularity, and any map not conforming to these requirements would be rejected. If the right of way along the located line

over unsurveyed land is not secured until a map can be prepared, filed, approved and returned to the local land office and notations thereof made on the government plats, it might well be that five years from the location of the road would elapse and all rights of the company under the grant be forfeited under Section 5 of the act. Meanwhile settlers would have ample opportunity to occupy the lands along the located line and gain priority over the company not only as to the right of way but as to the extra station grounds and adjacent lands from which it would necessarily draw its materials for the construction of the road. Honest efforts to secure the right of way under such conditions by filing a map would become utterly hopeless. What is the other method open to us according to the construction by which the Supreme Court of North Dakota felt itself bound? It is this—that the company can enter upon lands and build its road without filing any map and if it can get the road built before the settlers come in it can hold its right of way and station grounds and not be called upon to pay damages for its trespass upon the adjacent lands in taking timber and other material to build the road.

In *Van Wyck v. Knevals* this court held in the case of the land grants that the right of the company attached to the lands immediately upon filing the map and that settlements made after that time, although in good faith and without knowledge, were subject to the grant, and the court speaking

by Mr. Justice Field said that the company's right could not be made dependent upon the issue of the Secretary's order or upon notice of the withdrawal being given to the local land officers for "otherwise it would be in their power by vexatious and dilatory proceedings to defeat the act of Congress or at least seriously impair its benefit. Parties learning of the route established—and they would not fail to know it—might, between the filing of the map and the notice to the local land-officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them. (106 U. S., page 367)."

If that would be true with regard to a line located by a map filed in Washington, how much more true would it be as to a railroad that undertook to secure the benefits of the grant by actually constructing its line over the public domain in the face and eyes of every one? You cannot build a road without the definite location by stakes and the moment the company begins to build at the terminus next the source of supplies settlers would swarm to the line. There would not be an acre unoccupied from one end of the road to the other, because the presence of the graders upon any part of the located line would give positive hope and encouragement to the settlers that the road would be built. So there is not much choice between the absurdity of a dependence upon an approved map with regard to the right of way over unsurveyed lands and the absurdity of a constructed road as a

means of getting the benefits of this act. Such a construction writes absurdity all over the act and makes a farce of legal principles. No company may lawfully build its road under this act before it has a right of way and the right to take materials from lands adjacent thereto and to appropriate additional lands for station purposes not only as against the Government but as against everyone claiming under the Government.

It was held in *Lilenthal v. Ry.*, 56 Fed. 701, that the Company had no right to appropriate station grounds until it had located its line, and the right to take from the public lands the material, earth, stone and timber necessary for the construction of the railroad is subject to precisely the same rule because it must be taken from lands "adjacent to the line of said road," which is the precise language providing for the taking of station grounds. It must be conceded that the company could not go out and cut the timber from these lands without a lawful right to do so, and without having the right of way fixed within the meaning of the statute, and if the company waited until the road was built for such a definite location of its line and had no right to build because the line was not located, it would find itself in a treadmill of folly from which there could be no escape except to commit trespass and trust to luck. But it cannot be true that the railway company has the right to proceed to build its road, to appropriate two hundred feet of right of way, to take additional grounds for station purposes to the extent of twenty acres for every ten

miles, to cut from the public domain adjacent to such right of way the necessary timber, and remove from the land the necessary rock and other material with which to construct the road, *without having initiated any right as against settlers who may come in while said operations are proceeding and settle upon every acre of land affected.*

It is nothing short of a serious reflection on the justice and good sense of the Congress to say that it intended such a cumbersome and hazardous method of getting the benefits under this act, or that it expected a company to construct its road relying on the grant, only, to find at the end that it must pay for every acre of right of way and station grounds, for every foot of timber and every yard of rock and earth used, not at actual value but at twice or three times. Such a view makes of an apparently fair and generous gift, a mockery and a snare.

AS TO UNSURVEYED LANDS THEN THIS CONCLUSION IS CERTAIN:

Unless the grantee under the act has initiated its title to the right of way and other benefits covered by the act *by the location of its road* and is protected in those rights from the location until after the expiration of the time within which it must file its map, so that it enjoys an immunity against settlements, there is no lawful way by which it could possibly acquire the right of way and the other benefits under this act since there could be no title by map and no lawful right to build the road.

And the same holds true as to surveyed lands during the interim between location and the return of an approved map to the local land office.

THE REASONING OF SECRETARY VILAS IN RAILWAY V. DOWNEY, 8 LAND DECISIONS, 115 ERRONEOUS.

In order to legalize the construction of the road as a method of securing the benefits of the act without filing the map, Secretary Vilas, as quoted in the opinion of this court in *Railway v. Jones*, 177 U. S. 131 says:

> "The fact that the railroad company may locate and construct its road upon unsurveyed lands is clearly recognized in the fourth section of the act; and the regulations of the department have been made to apply to such cases, and authorize such construction."

This court approves of that view and goes further, for it said at page 132:

> "This decision and the subsequent decisions of the Interior Department were concerned with cases of construction on unsurveyed land, but we think the power applies also to surveyed lands. The only difference which the act of Congress makes between surveyed and unsurveyed land is the provision in section four for filing the profile of the road."

But if the company derives its legal authority to locate and construct its line from section four while it must wait for the opportunity to file its map, how can it possibly be said that this section is not applicable to such a case? Is it conceivable that the law from which one derives his authority to act is

not the measure of his rights under that authority? This proposition will not bear inspection and the whole argument as to rights obtained by a constructed road must fall to the ground.

Section four deals wholly with the location and filing of the map. There is nothing in its terms about construction except in the proviso which declares the forfeiture as to any road not built within five years from the location. It is true, nevertheless, as said by Secretary Vilas, that the right of location and construction while waiting for the filing and approval of the map arises out of these provisions of section four just as the right of the homestead or preemption settler to build his house and till the soil between settlement and filing arises from the law governing such grants. That is what the settler is there for, and to build a road is the sole object of locating the road.

But the right to build grows out of the *location made in good faith and with an honest purpose to file its map as required, and to complete its road within the period fixed*, precisely as the right of the settler grows out of his settlement made with like good faith and honest purpose.

Section four, however, not only says to the company you may occupy the land so located and build a road while waiting to perfect your paper title, but it also says you shall be protected and have immunity so long as you are not in default with respect to what the statute says you shall do, precisely as the law protects the settler, and the approved map when finally obtained becomes its patent relat-

ing to the location, just as the settler's patent relates to his settlement.

THERE IS A RADICAL DIFFERENCE BETWEEN THE RIGHT OF WAY AND THE LAND GRANT ACTS.

This court, at the close of the opinion in *Railway v. Jones*, says:

> "This conclusion does not conflict with the doctrine announced in *Van Wyck v. Knevals*, 106 U. S. 360, and in *Railway v. Dunmeyer*, 113 U. S. 629, that the title to lands passing under railroad land grants is considered as established at the date of the filing of the map of definite location. *The same question is not here presented. Different considerations apply to the grant of lands than to the grant of the right of way.*"

Those different considerations are made very plain when we compare the right of way act with the land grant acts. In the latter act is this clause:

> "But in case it shall appear that the United States have, when the line of the route of said road is definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right to pre-empt or homestead settlement has attached to the same, etc., then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest, etc., so much land, etc., as shall be equal to such lands as the United States have sold, etc."

And section four provides that

> "As soon as the company shall file with the Secretary of the Interior maps of its line des-

> ignating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted, etc."

It arises from these two provisions of the statute that the road is definitely fixed within the meaning of the land grant by the filing of the map, designating the route thereof, with the secretary.

No account is taken in this statute, nor is any right predicated upon a location in the ordinary sense, whereas in the right of way act, as we have seen, everything is reckoned from the location, using that term in the ordinary sense and not as defined by the above statute. It means the location by survey and stakes adopted by the resolution of the Directors as the line of route of the railway. Congress in the right of way act saw fit to recognize that location as of enough importance to serve as the initiation of the right of the railway company under the right of way grant. And surely there is no sound reason why it should be considered of less importance than the ordinary settlement of a homesteader or a pre-emptor upon the vacant Government land. Equal importance, and much greater, has been attached to such a location in other respects by the law.

Elliot on Railroads states this proposition:

> "When a proposed line has been regularly located and staked off and the expense thereof has been paid, the corporation by which it is done, has a prior claim to the right of way for a reasonable time, which cannot be defeated by another company that procures voluntary conveyances from the owners before the pro-

ceedings in condemnation instituted by the first have terminated."

Citing many cases, among them *R. R. v. R. R.*, 99 U. S. 463. That proposition, however, should rightly be modified so as to reach the case where the original company has had no time to institute the proceedings to condemn (3 Elliot on Railroads, Section 927).

The text writer further says:

> "The first company, in such a case, can condemn the right of way in the hands of the purchasing company in the same manner that it might have condemned it in the hands of the original owners."

Citing to that *Sioux City R. R. Co. v. Chicago, etc. R. R. Co.*, 27 Fed. Rep. 77. In that case Judge Shiras said:

> "The injustice and injury to private and public rights alike, which would arise were it held that after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made with good faith and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the sheriff for the appointment of commissioners."

In Volume 1, Section 121, the same author states the law with regard to the effect of location upon subscriptions to the stock. And it has been held that where the condition is that the line should be permanently located on a certain route and a freight house and depot be built at a certain point, the obligation to pay was perfect upon the location of the road and was not postponed for the building of the freight house and the depot. Where the obligation to pay was based upon the condition that the money should only be used for paying the damages and costs in acquiring the right of way if the plaintiff's railroad should be permanently located and constructed through Lexington, it was held that the construction of the road was not a condition precedent.

In *Miller v. Pittsburg, etc.,* 40 Penna. 237, where the condition was that the company should locate and construct its road to a certain point, it was held that the stock should be paid for when the railroad was located at the point. The same was true in *Warner v. Callander,* 20 Ohio State 190; *Swartout v. Michigan, etc. R. R.,* 24 Mich. 389, 404, 405, and the general proposition seems to be clearly upheld by authority that where subscription is made upon condition that the road be built to a certain point, the money is payable upon call when the road is permanently located in good faith upon a designated route.

This, then, is what the Congress meant by the use of the term "location of any section of twenty

miles of its road" in the fourth section of the act. And it is this which constitutes, within the meaning of this act, the *definite location* which in the land grant acts could only be made by filing the map. Hence the observations of this court quoted above that the same question that arose in the land grants does not arise here; that different considerations apply to the grant of lands than to the grant of the right of way have an important bearing on the question presented here.

The structure and purpose of the two acts are radically different. There is no analogy between the requirements of the act granting the right of way and the requirements of the land grant acts, while the analogy between the right of way and the pre-emption and homestead acts is well-nigh perfect. What is meant by this is that we shall look in vain in the land grant act for such a provision as that contained in section four requiring the railway company to file a map within twelve months after the location of any section of twenty miles of its road, if upon surveyed lands, or within twelve months after the survey by the United States if upon unsurveyed lands.

While it is strongly intimated by the language quoted from the decision in the Jones case that a more liberal rule would apply to the consideration of the grant of right of way, and as it was more distinctly said by the court in the case of *Railroad Co. v. Baldwin*, 103 U. S. 426-430, the construction adopted by the Supreme Court of North Dakota makes the right of way act more stringent and the

securing of the benefits much more difficult and uncertain because as decided by this court in *Van Wyck v. Knevals,* 106 U. S. 360, the title of the railway company became perfect upon filing the map with the Secretary of the Interior, without any further act on the part of the railway company, and this could not be defeated nor in any way impaired by failure or delay on the part of the land department in further proceedings, whereas by the construction from which we are appealing the title of a railway company to any benefit under the right of way act is postponed until the last clerical act required to be done, namely the entrance upon the plats in the local land office of the right of way designated by the approved map.

It is apparent that the consideration of the true construction of this right of way act has been greatly confused by reading into it in effect the provisions respecting the definite location of the railroad in the land grant acts. Whereas, if the attention be confined entirely to the terms of the right of way act itself, the clear way appears by which the company may, by reasonable effort and good faith, enjoy the benefits which Congress intended it to enjoy and by which the manifest purpose of Congress may control.

It is respectfully submitted that the judgment of the Supreme Court of North Dakota should be reversed.

ALFRED H. BRIGHT,
Counsel for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 81.

THE MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAILWAY COMPANY,

Plaintiff in Error,

vs.

THOMAS DOUGHTY.

In error to the Supreme Court of the State of North Dakota.

Brief for Defendant in Error.

GEORGE W. SOLIDAY,
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Counsel for Defendant in Error.

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ADDITIONAL STATEMENT.

In addition to the statement of fact contained in the brief of counsel for plaintiff in error, the attention of the court is respectfully directed to the following additional facts appearing upon the record which have an important and material bearing upon the points presented by this appeal.

Upon the hearing of this case before the Supreme Court of North Dakota, the plaintiff in

error did not bring up the evidence taken in the District Court in which the action was tried. Aside from the pleadings, the only part of the record before the Supreme Court of North Dakota or of this court which purports to present the facts at issue is the findings of fact of the trial court. Plaintiff in error must, therefore, be held to concede that these findings are supported by the evidence and present an undisputed statement of the facts upon which the trial court based the decree which was affirmed by the Supreme Court of North Dakota.

The trial court found that, "The preparation and filing by said defendant (plaintiff in error here) of the copies of its articles of incorporation and proofs of its organization under the same, and the preparation, adoption, filing and approval by the Secretary of the Interior of the plat or profile of that section of its railroad extending across the land in question and all said acts, were done or procured to be done by said defendant for the purpose of securing a right of way across the public lands of the United States before and in anticipation of the construction of its railroad under and by virtue of the provisions of an Act of Congress approved March 3rd, 1875. (Findings of Fact, Transcript of Record, p. 17--18, f. 86.)

It further appears from the findings of the trial court that, at the time of Doughty's homestead entry at the United States District Land Office at Fargo, North Dakota, of the land in question, the railroad of plaintiff in error had

not been in any part constructed or the ground graded or in any manner broken or prepared for such construction. The survey of plaintiff in error across said land, upon the line on which it afterward located its railroad was marked, only, by a row of stakes along the center line of its route. This row of stakes was not observed by Doughty prior to or at the time he made his entry, or at the time of his settlement on the land. He did not at either of these dates know that a survey had been made on the line of route upon which the railroad was afterward constructed. The line of a preliminary survey made on the land by plaintiff in error in October, 1891, at a distance of 600 or 700 feet from the line upon which the railroad was afterward constructed, was first called to the attention of Doughty on or about June 27th, 1892, two days after his entry. This line of route was abandoned by plaintiff in error at the time it made its second survey between the 9th and 13th days of May, 1892.

The patent issued to Doughty on November 4th, 1899, conveyed to him the land in question in absolute fee simple, without reservation to plaintiff in error of any right, claim, or title to any part for use as a right of way or for any purpose.

ARGUMENT.

As stated by counsel for plaintiff in error, in his brief, the specification of errors assigned upon

this appeal presents but a single point. The outline of this point as presented by counsel is, however, much too general and vague to convey a clear impression of the question at issue. The undisputed facts show that the Railway Company, before and in anticipation of the construction of its road, elected to obtain title to a right of way over the land of defendant, by compliance with section 4 of the act of March 3rd, 1875. Proceeding in accordance with the provisions of that act, it failed to file in the Local Land Office or secure the approval of the Secretary of the Interior to the profile of its line of route, before the entry and settlement of defendant upon the land as a homestead claimant. Defendant made his entry and settlement without notice, actual or constructive, of the fact that plaintiff in error had made a definite survey of its line of route across the land and was about to construct a railway thereon. The question presented is, therefore, can a Railway Company proceeding under these conditions, claim priority of right on the theory of "relation back" of its title, as against a settler whose possessory claim had meantime, in good faith, attached?

The act of March 3rd, 1875, has never, since its passage, been regarded as similar in operation to the large class of Congressional Acts granting aid in the construction of railroads. In all of these acts the grantee was specifically named, and the grant was absolute, unconditional and without limitation by the provisions of the act itself. The grant of these acts was held to be a

present one and immediately upon the definite location of the lands or right of way granted, the title of the grantee named in the act was held to relate back to the date of the act. Such construction of the act with reference to the title acquired was based upon the present, absolute and unconditional character of the grant.

St. Joseph & R. R. Co. vs. Baldwin, 103 U. S. 426.

The construction of these acts throws but little light upon the more complex operation of the act of March 3rd, 1875. It is clearly settled that this act does not operate as a present grant. A grantee is not named in the act, and this court has held that "there can be no grant unless there is a grantee and consequently there cannot be a present grant unless there is a present grantee."

Hull vs. Russell, 109 U. S. 509.

"In all cases where a grant was given a present effect, a state or some other corporation having all the qualifications specified in the act had been designated as a grantee. In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named."

Jamestown & N. Ry. Co. vs. Jones, 177 U. S. 125.

Spokane Falls and N. Ry. Co. vs. Ziegler, (C. C. A.) 61 Fed. 392.

The Supreme Court of Kansas has pointed out some of the surprising and absurd results that would follow if this act were to be construed as operating as a present grant with relation of title back to the date of the act.

Chicago etc. Ry. Co. vs. Van Cleave (*Kansas*), *33 Pacific 472.*

The act provides in section 1, that any Railroad Company may be named as a grantee by filing with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization thereunder. "In order, then, to make this grant attach, it is necessary to provide fixity of grantee as well as fixity of location upon the ground."

Dakota Central R. R. Co. vs. Downey, 8 Land Dec. 115.

Secretary Vilas in his opinion in the case last cited uses this language: "Immediately, therefore, upon the filing of these two documents, the company stands in an attitude of being named in the act as entitled to its benefits so far as the grantee is concerned—I think no further." All authority concurs in holding that something more than fixity of grantee is necessary to put the act in operation as a present grant and that the rights of the Railroad Company do not attach as of the date of filing the documents whereby it is specifically named as grantee.

The only purpose of such filing is to advise all persons interested, and more particularly the

grantor, the United States, that the railroad company proposes to avail itself of the grant.

Phoenix & E. R. Co. vs. Arizona E. R. Co. (Ariz.) 84 Pac. 1097.

"If the first section (of the act of March 3, 1875) stood alone it would be difficult to escape the conclusion that it was the intention of Congress that the grant therein mentioned should attach in favor of any railroad company immediately upon the filing of a copy of its articles of incorporation and proofs of organization as therein provided; but a consideration of subsequent sections leads us to the conclusion that such was not the intention of the framers of the act. By the 4th section it is provided (here are inserted the provisions of section 4). From this provision it would appear that no Railroad Company can claim to be a grantee of a right of way over the public lands until a profile of its road has been filed and approved as therein specified; and, after that has been done, the grant is not operative upon lands to which private rights had previously attached."

Enoch vs. Spokane Falls & N. Ry. Co., (Wash.) 33 Pacific 966.

Jamestown & N. Ry. Co. vs. Jones, 7 N. D. 119; 76 N. W. 227.

"This act (of March 3rd, 1875) is in the nature of a general offer to the public, which takes effect and becomes operative as a grant to

a particular company, only when it accepts its terms by a compliance with the conditions precedent prescribed in the act itself. This proposition rests on elementary principles. A grant, like any other contract, must have two parties,—a grantor and a grantee, and an offer not accepted constitutes no contract. This is clearly the theory on which the act is framed. It merely offers or proposes to give any railroad company, upon compliance with its terms, the right of way over public lands to which private rights have not attached, at or before the date of such compliance."

Red River & C. R. Co. vs. Sture, (Minn.) 20 N. W. 229.

"The act, therefore, did not give a right of way presently, but entitled any company to obtain a right of way upon performing certain conditions, and its right attached upon filing a profile map of its road, as provided in section 4."

Spokane Falls & N. Ry. Co. vs. Zeigler (C. C. A.) 61 Fed. 392.

Affirmed without modification at 167 U. S. 65.

By all construction given to the act of March 3, 1875 it is settled with scarce a dissenting voice, (1) that the act does not operate as a present grant; (2) that it is a grant upon condition; (3) that the right of the railroad company does not attach by relation back of title, as of the date of

the act or as of the date of its compliance with the provision whereby it may be specifically named as a grantee. It is further settled that Congress did not grant to the Railroad Company by the act, possessory claims of settlers upon the public land, even though inchoate, which existed at or prior to the time when the title of the railroad company attached. Section 3 of the act is declared to be, "An express provision saving the rights of settlers in possession."

Washington & I. Ry. Co. vs. Osborn, 160 U. S. 103.

Spokane Falls & N. Ry. Co. vs. Ziegler, (*Supra.*)

In the light of these rulings some of the contentions advanced with great apparent seriousness by counsel for plaintiff in error appear to be wholly fallacious; for instance that, "It might be urged on the strength of the Baldwin case that this act is in *in praesenti* as of the date when the railway company becomes a grantee by filing its articles and due proofs with the Secretary of the Interior; that this is the commencement of the proceedings to acquire the title which being followed up by the location, filing of map, etc., gives it precedence over all rights initiated after the filing of the articles and due proofs, that by the doctrine of the Baldwin case the approval of the map relates back to the date of the filing of the articles and cuts out all intervening possessory claims." (Brief p. 7.)

The doctrine of the Baldwin case referred to by counsel is that the title relates back to the date of the act and not to the date of any intermediate step required of the railroad company.

It being practically conceded that the title of a railroad company claiming right of way under the Act of March 3, 1875, does not attach as of the date of the act or as of the date when it is specifically named as grantee, we reach the point upon which the present controversy hinges, namely, at what precise time does the right of the railroad company attach? As announced by Secretary Vilas in his opinion in Railroad Company vs. Downey, which has been distinctly approved by this court, such title attaches when, under the provisions of the act, fixity of grantee concurs with fixity of location; or, as suggested by the Supreme Court of North Dakota, in the present case, "when a grantee qualified to take has definitely located the right of way claimed under the grant." (Transcript of Record, p. 10).

It is admitted that prior to the initiation of its claim to right of way the plaintiff in error had been named as a grantee under the provisions of the act of March 3, 1875. But one point therefore, remains unsettled; and that point involved in the question, "what constitutes a definite location of the right of way" is in this case, as in the case of Jamestown & N. Ry. Co. vs. Jones, the point upon which the controversy hinges.

This court, in the Jones case, decided that a right of way may be definitely located by actual construction of the road for the reason that "construction of the road, is certainly unmistakable evidence and notice of appropriation." "This ruling," the opinion holds, "gives a practical operation to the statute, and we think it correct. It enables the railroad company to secure the grant by an actual construction of its road, *or in advance of construction by filing a map as provided in section 4.*"

Jamestown & N. Ry. Co. vs. Jones, 177 U. S., 125.

In the case at bar, the plaintiff in error does not rely upon actual construction of its road as constituting definite location of its line of route at the time the rights of Doughty attached to the land. According to the undisputed facts, at that time its road was not constructed and the physical evidences of its survey were not such as to give Doughty notice that it was attempting to initiate a claim to right of way across the land. Long prior to that time defendant's land, as well as the surrounding land, had been surveyed; so that any difficulty which might arise in making a definite location of its right of way over unsurveyed lands, before and in anticipation of the construction of its road, was not presented. It, therefore, elected to proceed as suggested in the opinion in the Jones case "by filing a map as provided in section 4."

As shown by the findings of the trial court the final survey of the Railway Company was made between the 9th and 13th days of May, A. D. 1892. It might have had its map prepared, filed in the Local Land Offie and approved immediately after this survey. Proceeding in a leisurely manner, however, the profile was not presented to its board of directors for adoption until the 17th day of June, 1892; and was not filed in the local land office until July 20, 1892.

The map of definite location was not approved by the Secretary of the Interior until October 14th, 1892. Whether or not plaintiff in error is chargeable with the delay in transmission of this plat from the local land office to the Secretary of the Interior, the late filing of the map in the local land office on July 20th, 1892 is its own act for which it is clearly responsible.

Meantime, on July 1st, 1892, without notice either by a notation upon the plats of the local land office or by the evidences of the actual construction of a railroad across the land Doughty had made his settlement as a homestead claimant. His possessory claim attached on and the title he afterward acquired relates back to that date. Just as the filing by the Railroad Company of its articles of incorporation and due proofs of its organization under the same is intended as notice to the United States that it proposes to avail itself of the grant of the act of March 3rd, 1875, so the filing of its profile of

route in the local land office is intended as notice to prospective settlers on the public lands of its intention to appropriate a right of way across those lands. To a settler about to make a homestead or preemption entry such notice was an important and valuable right. At a time when there were large, unoccupied tracts of public lands to select from, he might not desire to enter a tract burdened by the right of way of a railroad company. In order, therefore, that an intending settler might act advisedly in making his selection, the act of March 3rd, 1875, provided that he should have constructive notice of the fact of the Railroad Company's claim, and of its location, by means of a map filed in the local land office showing its line of route and a notation of the same upon the plats of public lands open to settlement.

In this, as in all other cases where the party entitled to notice is actually advised of the fact, the necessity of constructive notice is dispensed with. As said by Secretary Vilas in his opinion in R. R. Co. vs. Downey (8 Land Dec. at page 119.) "If a road has been constructed through unsurveyed lands, every person who makes entry upon any given subdivision surveyed after the construction of the railroad does so *with notice of the fact* that the railroad owns a right of way to the extent of one hundred feet in width on each side of the central line of said road." So, this court has held, that actual construction of its road enables the railroad company to secure the grant without filing a map as provided by section

4 of the act. That this ruling is made upon the theory that the settler receives notice from the actual construction of the road is shown by the language of the opinion in the Jones case, "Actual construction of the road is certainly unmistakable evidence and notice of appropriation." This can only mean, it is respectfully suggested, that the actual construction and operation of a railroad across a tract of land is in itself evidence of appropriation so plain and unmistakable that a settler upon the public lands who makes his entry with it before his eyes cannot complain, after entry upon the land, *that he did not have the notice to which the act entitles him* that a right of way across it was claimed by a railroad company. Unless, however, the railroad company can point to actual evidence and notice of its appropriation of a right of way as unmistakable as that afforded by complete construction of its road, as against the claim of a settler it can secure the grant only by showing full and technical compliance with section 4 of the act of March 3rd, 1875.

Jamestown & N. Ry. Co. vs. Jones, 177 U. S., 125.

It being conceded that at the time of his entry and settlement upon the land, Doughty was without actual notice of the railroad company's claim, it follows that if he was entitled to notice at all, that notice could be constructive only. When the Railroad Company elected to give such notice by filing a map as provided by section

4, instead of by the actual construction of the road, it knew, from the terms of the act, that its line of route would not be noted on the plats of the land office and thus serve constructively as notice to an intending settler, until its map had been approved by the Secretary of the Interior. In proceeding as it did under section 4 of the act of March 3rd, 1875, it will be held to know that by constructions more nearly contemporaneous with its passage than any other placed upon that act, the General Land Office and the Secretary of the Interior held that the line of route of a railroad company was not definitely located and its title to the right of way did not attach until the approval of its map by the Secretary of the Interior.

Circular of Commissioner Williamson, 2 Copp's Public Land Laws, 816.

Opinion Sec. Vilas in R. R. Co. vs. Downey, 8 Land Decisions, 115.

Circular of Commissioner Stockslager, 12 Land Dec. 423.

By proceeding, therefore, before and in anticipation of the construction of its road, under section 4 of the act of March 3rd, 1875, the plaintiff in error virtually acknowledged that Doughty was entitled to the notice given constructively by the filing of an approved map in the local land office before its right could attach in priority to his.

Counsel for plaintiff in error in his brief characterizes the method of obtaining title to right of way prescribed by section 4 of the act as a mockery, and asserts that a construction which requires technical compliance with its requirements "writes absurdity all over the act and makes a farce of legal principles." (Brief, p. 33). He further says, "it is nothing short of a serious reflection on the justice and good sense of Congress to say that it intended such a cumbersome and hazardous method of getting the benefits of this act." (Brief, p. 34). Yet it must be conceded, that plaintiff in error deliberately chose this method at a time when the only authoritative construction placed upon the act held that the title of a railroad company would attach only upon strict compliance with section 4 down to the last act. The new doctrine of "relation back" had not yet sprung from the mind of legal counsel or been sanctioned by a divided state court.

It will be noted that counsel's charge that the method of obtaining title by section 4 of the act is cumbersome, hazardous, and farcical (Brief, pp. 30-34), is directed wholly to a claim upon unsurveyed lands. It is true that in such a case the railroad company could not prepare and file an approved map. It might, however, as in the Downey case, make definite location of its line of route by means of a constructed road. On unsurveyed lands, it is no greater hardship for a railroad company than for a settler to require that a prospective claim be manifested by some

visible evidence of appropriation. The settler, in order to establish a possessory claim, must give physical evidences of his presence on the land by building a house, cultivating the land, and making other visible improvements. The railroad company may secure its right of way by constructing a road. On surveyed lands, however, as in the case at bar, both settler and railroad company may, if they so elect, in advance of visible appropriation, give evidence of their claims by filings at the local land office.

It is submitted that the requirements of section 4, of the act of March 3rd, 1875, are not hazardous, cumbersome, or even obscure; but that, on the contrary, they are plain, simple, and may be easily followed by any person of ordinary intelligence. "It appears to us that the act of Congress contemplates that for the acquisition of title by a railroad company, the company shall perform three acts: First, it shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, thus formally advising all persons interested and more particularly the grantor, the United States, that it proposes to avail itself of the grant; second, it shall locate its road; third, it shall file with the Register of the land office for the district where the land is located a profile of its road and secure the approval thereof by the Secretary of the Interior, thus consummating the requirement of legal title to the right of way."

Phoenix & E. R. Co. vs. Arizona E. R. Co.,
(Ariz.) 84 Pacific, 1097.

It will, therefore, be noted that a series of three acts whose entire performance the Supreme Court of Arizona does not consider onerous was greatly simplified in the case of plaintiff in error by the fact that after May 13th, 1892, two of these acts were already performed, in that the Railroad Company had been specifically named as a grantee under the act and had completed its survey. Further than this the performance of the remaining act, the preparation and filing of its profile of route, and the presentation thereof for approval by the Secretary of the Interior, was reduced to a mere clerical formalism by the fact that in the year 1888, the Commissioner of the General Land Office had prepared and generally circulated detailed directions, pointing out with technical exactness what the profile should show, the form of affidavits to be attached to it and the manner in which it should be filed in the local land office and the approval of the Secretary of the Interior obtained.

Circular of Commissioner Stockslager, 12 Land Dec. 423.

In attempting, therefore, to perfect its paper title to a right of way over Doughty's land it can scarcely be said that plaintiff in error had before it a hazardous, cumbersome or complex task. The difficulty of which counsel complains inheres not so much in the requirements of the act of March 3rd, 1875, as in the fact that the railroad company failed to comply with the terms of the act in time to perfect its title to a right of way

over Doughty's land prior to his settlement. It may be truly said of plaintiff in error as was observed by Judge Ross of another railroad company claiming under the same act: "The trouble with the railroad company is that it did not pursue the law, the provisions of which are plain enough."

Lilienthal vs. Southern California Ry. Co., 56 Fed. 701.

Counsel, in his brief, would lay great stress upon the word "location" as used in the 2nd and 4th sections of the act of March 3rd, 1875, in determining when the title of the railroad company attaches. "It is to be noted," he asserts, "that everything is reckoned from this act—the time within which it shall file its map and the time within which it must build its road. It is also plain that the right to take materials and acquire extra ground for station purposes is dependent upon the location of the road because they must be taken adjacent to the right of way. And the right of way could only be determined by the location of the road." (Brief, page 8).

It is submitted that the importance counsel would attach to this word is altogether out of proportion to its real significance. It is used very loosely and its meaning varies, not only in different parts of the act, but at the two places in

which it appears in section 4. It is, also, evident that in the third line of section 4 of the act it is used with a meaning very different from the term "definite location" employed by this court in its opinion in Jamestown & N. Ry. Co. vs. Jones. "Definite location" as used in that opinion was declared to be the question upon the answer to which "the present controversy hinges." In other words, it was the act in which the claim of the railroad company culminates and on the completion of which its title attaches. Such "location" was obviously not referred to in the third line of section 4, for the reason that after such "location" the act looks forward to the filing of an approved map before title attaches. If the term meant "definite location," title would attach without the necessity of filing a map or of any further act on the part of the railroad company. The term "location" as used in the third line of section 4, according to Secretary Vilas, "must mean the determination by the corporation, through its stockholders or board of directors, of the projected line upon which it purposes to construct the road. That 'location' must precede construction; and it must also precede the filing of a profile, which is only another phrase for a map of definite location, a phrase frequently used in acts granting lands in aid of the construction of railroads."

Dakota Central R. R. Co. vs. Downey, (Supra), at page 118.

It will be seen, therefore, that the force and significance to, be given the word "location" where it appears in the act depends entirely upon whether it is used with the sense and meaning of the term, "definite location" given it by his honor, Justice McKenna, in the opinion in Jamestown & N. Ry. Co. vs. Jones. That it is not so used in the third line of section 4 is evident. It may be, and probably is so used in the latter part of section 4 where the period within which the construction of the road must be completed, is prescribed.

A reason is readily apparent why a "location" such as is referred to in the third line of section 4 of the act, should not be the factor determining the date of attachment of the railroad company's rights. As hereinbefore suggested the provisions of the entire act indicate a Congressional intent to protect the possessory claims of settlers by requiring some notice to him of a purposed claim of a railroad company. This element of notice, actual or constructive, to the settler is suggested throughout the act and distinguishes it in that particular from prior acts granting lands in aid of the construction of railroads. That Congress in passing the act of March 3rd, 1875 had in mind the element of notice to settlers of projected claims of railroad companies upon public lands, is shown by the fact that in the previous year in passing "an act for the relief of settlers on railroad lands," it attached the provision "That this act shall not

be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a preemption or homestead settler *after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such land from market.*"

1. Supp. Rev. St. U. S. (2 Ed.,) 1874-1891, p. 39, c 400.

Now it is evident that the survey of a line of route by a railroad company and the adoption of a plat by its stockholders or board of directors is without force as notice. This is strikingly illustrated by the facts of the present case, from which it appears that the survey of plaintiff in error and its adoption by its board of directors, although both occurred before Doughty's settlement on the land, were wholly uncommunicated to him.

Aside from the plain language and meaning of section 4, however, it is evident that a survey of a line of route unmarked except by surveyor's stakes, and its adoption by resolution of the board of directors of a private corporation is not a definite location of it. Frequently several surveys are made before a line is definitely located and there is no law preventing the rescission of an unrecorded resolution adopting a certain line of route, by the corporation that passed it. In order, therefore, that the officers of

the land department may be satisfied that the location provided for by section 4 of the act, is fixed and no longer "a float," it is required to be reduced to the form of a profile or map and this map not only adopted by resolution of the board of directors of the railroad company but approved by the Secretary of the Interior. As the Secretary of the Interior would not approve more than one profile or route, it follows that his approval gives the line definite location. It is clear, therefore, that this additional guarantee of the Secretary's approval was considered necessary by Congress to give fixity and definite location to the line of route selected; and only after such fixity and immobility is assured, shall the public lands, "over which such right of way shall pass, be disposed of subject to such right of way."

It would seem therefore that counsel has regarded the word "location" as used in the first part of section 4 of the act with an exaggerated and partial view. The idea it suggests is not the center around which clusters everything of importance mentioned in the act. It has no fixed or well defined meaning and certainly is not entitled to the same importance as the word "thereafter" occurring further along in the 4th section which, as suggested by the Supreme Court of North Dakota, is the word which determines the true construction of the act.

Jamestown & N. Ry. Co. vs. Jones, 7 N. D. 119; 76 N. W. 227.

That the act of March 3rd, 1875, is not a grant *in praesenti* of right of way to a railroad company named as a grantee and that the title of the railroad company, before and in anticipation of the construction of its road, does not attach as of the date of the act or as of the date of any compliance with the act on the part of the railroad company prior to the approval of the profile of its line of route by the Secretary of the Interior, is the construction given the act by the Supreme Court of the United States, the Circuit Court of Appeals for the Ninth Circuit, the Circuit Court for the Southern District of California, the Secretary of the Interior, and the Commissioner of the General Land Office, and the State Supreme Courts of the states of Colorado, Idaho, Kansas, Minnesota, North Dakota, Oregon and Washington, and the Territorial Court of Arizona.

In 1893, in passing upon the duty of the Secretary of the Interior with relation to the act of March 3rd, 1875, this court, in an opinion by his honor, Justice Brown, uses this language: "At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the

plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road."

Noble vs. Union River Logging R. Co., 147 U. S. 165.

In 1897 this court affirmed without modification a judgment of the Circuit Court of Appeals, Ninth District, wherein his honor, Judge McKenna, as Circuit Judge, expressed the opinion with reference to the act of March 3rd, 1875, that, "the act, therefore, did not give a right of way presently but entitled any company to obtain a right of way upon performing certain conditions, and its right attached upon filing a profile map of its road as provided in section 4. It will be observed that the provision of section 4, is that, 'after filing the profile of the road, all lands over which the right of way shall pass shall be disposed of subject to such right of way.' Lands, therefore, which had been disposed of theretofore were exempt. The preemption laws were certainly a means of disposing of the public lands, and an entry of record under them, valid on its face, is such an appropriation of the tract entered as segregates it from the public domain and precludes it from subsequent grants."

Spokane Falls & N. Ry. Co. vs. Ziegler, 167 U. S. 65.

Opinion Judge McKenna in same case, 61 Fed. 392.

Of the opinion last quoted from, counsel in his brief remarks, "it will be noted that this does not agree with the position taken by plaintiff's counsel, because he says that it is only upon the approval of the map (that the railroad rights attach), which might be months after the filing, as it often was." (Brief, p. 16). That Judge McKenna in using the words, "upon filing a profile of its road, as provided in section 4," meant a profile approved by the Secretary of the Interior is shown by the words used in the following sentence which could apply only to an approved profile.

In 1900, this court in speaking of the ruling of Secretary Vilas in R. R. Co. vs. Downey, 8 Land Dec. 115, uses this language: "The rule gives a practical operation to the statute and we think it is correct. It enables the railroad company to secure the grant by actual construction of its road or in advance of construction by filing a map as provided in section 4."

Jamestown & N. Ry. Co. vs. Jones, 177 U. S. 125.

Of this language the Supreme Court of North Dakota in its opinion in the case at bar, remarks: "The necessary inference from the language used by Mr. Justice McKenna, in the Jamestown and Northern case, is, it seems to us, that actual construction is the only sufficient act, other than compliance with section four, to constitute a definite location, and the right of way does not exist before actual construction unless the company's profile map has been approved by the

secretary, before the settler's rights attached." (Transcript of Record, p. 11).

The other rulings and cases above referred to as authority for the proposition that the title of the railroad company does not attach to right of way claimed by it, before construction of its road, under section 4 of the act, until the approval by the Secretary of the Interior of a regularly adopted profile or map of its line of route, may be cited as follows:

Lilienthal vs. Southern California Ry. Co., 56 Fed. 701.

Dakota Central R. R. Co. vs. Downey, 8 Land Dec. 115.

Circular of Commissioner Williamson, 2 Copp's Public Land Laws 816.

Circular Commissioner Stockslager, 12 Land Dec. 423.

Denver & R. G. R. Co. vs. Wilson, 28 Colo. 6; 62 Pac. 843.

Hamilton vs. Spokane Falls & P. Ry. Co., 3 Hash. (Idaho) 164; 28 Pac. 408.

Chicago K. & N. Ry. Co. vs. Van Cleave, 52 Kan. 665; 33 Pac. 472.

Red River &c. R. Co. vs. Sture, 32 Minn. 95; 20 N. W. 229.

Jamestown & N. Ry. Co. vs. Jones, 7 N. D. 119; 76 N. W. 227.

Larson vs. Oregon Ry. & N. Co., 19 Ore. 240; 23 Pac. 974.

Enoch vs. Spokane Falls & N. Ry. Co., 6 Wash. 393; 33 Pac. 966.

Riedt vs. Spokane Falls & N. Ry. Co., 6 Wash. 623; 34 Pac. 150.

It will be noted that it is the uniform holding of all the state courts whose opinions are cited above, that the approval of the profile of line of route by the Secretary of the Interior is an absolute condition precedent to definite location of its road, and that acquisition of title by the railroad company dates from that act.

Counsel, in his brief, characterizes the reasoning of Secretary Vilas in his opinion in Dakota Central Railway Company vs. Downey, as erroneous, (Brief p. 35); he criticises the holding of the Supreme Court of North Dakota in the case of Jamestown & Northern Ry. Co. vs. Jones, (Brief p. 13); and alleges, that the decision of this court in the case of Jamestown & Northern Ry. Co. vs. Jones was right only so far as it reversed the decision of the Supreme Court of North Dakota. Beyond that, he regards it "as based upon an erroneous construction of this act of Congress borrowed from the decision of the Secretary of the Interior in Dakota Central Ry. Co. vs. Downey," (Brief p. 25.) His criticism of

these opinions is directed against an apparent holding in all that definite location, under section 4 of the act, is perfected only by the approval of the Secretary of the Interior of the profile of the line of route. The difficulty as discovered by him in these decisions, "arises from a too rigid and literal or verbal construction: that the word 'thereafter' means only after the last act recited has been done. Whereas, it is perfectly legitimate to consider that the term 'thereafter' applies to the first thing which the railroad company was required to do, to-wit: the location of its road. That it refers to the whole group of acts for securing the title and that by the doctrine of relation when the map is approved the title vests in the railroad company as of the date of the location of its road." (Brief p. 14.) It is quite apparent, that the word "thereafter", "refers to the whole group of acts for securing the title," mentioned in section 4, in that it provides that only after the performance of the last act, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." It is not legitimate, however, and in a grammatical sense is absolutely impossible, "to consider that the term thereafter applies to the first thing which the railroad company was required to do, to-wit: the location of its road." The "location" of the road, regarding such act as the adoption of its profile of road by the board of directors of the railroad company, before its filing in the local land office, could not be known to the land officers and consequently could not

"be noted upon the plats in said office." The only acts of which the land department were cognizant was the filing of the plat and its approval by the Secretary of the Interior. When this act was done, and not before, the line of route was to be noted upon the plats of the land office; and "thereafter" the public lands through which the line of route passed were to be disposed of in accordance with this notation. If the verbal construction given the word "thereafter" by Judge Corliss of the Supreme Court of North Dakota was too rigid, certainly it may be said that the construction which counsel would put upon it is very much more elastic than any rule of syntax or principle of law will permit.

It will be noted that, in the cases last cited, the doctrine of relation contended for by counsel receives no countenance. This doctrine, so far as it has found its way into judicial holdings, may be said to appear only in the majority opinion of the Supreme Conrt of Missouri in Kinion vs. Railway Company, (118 Missouri 577; 24 S. W. 636.) It savors of strong assumption to assert that the Supreme Court of Colorado meant to attach itself to this doctrine in the case of Railway Company vs. Hanoum, (19 Colorado 162; 34 Pac. 838); if such was the case, however, such holding was positively and expressly overruled by the later and better considered case of Denver & R. G. R. Co. vs. Wilson, cited above.

The Utah case of Lewis vs. Railway Company (54 Pac. 981) adopts without discussion the holding with reference to relation of title in Kinion vs. Railway Company and cites as supporting this doctrine the case of Railway Company vs. Hanoum above referred to and Railway Company vs. Alling (99 U. S. 463.) It is not contended otherwise by counsel and is perhaps needless to state that in the opinion of the last mentioned case the act of March 3, 1875, is not mentioned or touched upon. The opinion simply construes an act granting lands to aid in construction of railroads to whose operation, it is admitted, different considerations apply.

The case of Kinion vs Railway Company is chiefly remarkable for the inconsistency of its holdings. It originates the doctrine of "relation" with reference to the title of a railway company claiming under the act of March 3rd 1875; but denies this doctrine with reference to the title of a settler under the homestead law although the act of May 14th, 1880 had long been in force, providing in distinct terms, that such rights, "shall relate back to the date of settlement, the same as if settled under the preemption laws,"—an inconsistency which calls forth a vigorous dissent from Judge Barclay. It bases its holding, to some degree at least, upon the point that the homestead settler had actual notice of the definite location of the railroad when he made his homestead entry—a point which had it related to the date of settlement instead of the

time of entry, under the holding of this court in the case of Railway Company vs Jones would have given priority to the rights to the railroad company, without reference to any relation of title.

The majority opinion of the Supreme Court of Missouri in Kinion vs Railway Company contains no discussion of the doctrine of relation, gives no reason for its holding and contents itself with the announcement that the grant of the railroad company, "took effect by relation as of the date of the location of the road over the land." The act of the railroad company referred to as "location" is not definitely described. It appears, however, that the act was contemporaneous with or closely accompanied by evidences of appropriation on the part of the railroad company such as clearing out the right of way and other incidents of construction. That the act of location mentioned consisted of something more than an adoption by the board of directors of the railroad company of a line of route, is shown by the fact that settler, "knew that the road had been located across this land, the right of way cleared, and the work of construction of the road commenced when he made his homestead entry." Such "location" as this approaches very nearly to the "definite location" based on construction, and, in itself, operating as notice, mentioned by this court, in its opinion in Railway Company vs Jones; and the Kinion case cannot, in any view, be considered as authority for the proposition

announced by counsel that the relation of title goes back to the date of the adoption of the final survey by the directors of the railroad company.

This theory of counsel seems to be based upon a fancied analogy of the rights of a railroad company under the act of March 3rd, 1875 to those of settlers upon the public lands under the homestead and preemption acts. There is no authority for the assertion that such analogy exists. On the contrary, an examination of adjudicated cases would indicate that the courts construe the homestead and preemption laws liberally in the settlers' favor; while the acts granting land to aid in the construction of railroads are, as against the rights of an actual settler, strictly construed. Further than this, the rule whereby the title of homestead and preemption claimants relates back to the date of settlement, is fixed by statute (1 Supp. Rev. Statutes U. S. (2nd Ed.), 1874-1891, p. 282, c. 89); and, as suggested by Judge Barclay in his dissenting opinion in Kinion vs Railway Company, "if congress had intended that the location of the road, as defined on the profile approved by the secretary of the interior, should relate back and take effect as of a prior date, it would have undoubtedly so declared. * * * * * * The doctrine of relation is a fiction of jurisprudence, sometimes invoked to attain the ends of justice; but it certainly cannot be applied when it interferes with the express terms of positive law. The word 'thereafter' in the statute before us, (act of March 3rd, 1875), shows so manifestly the legislative purpose not to transfer to the rail-

way company the public title until the date of approval by the secretary, that no room is left for an application of the theory of 'relation'."

That congress, prior to the passage to the act of March 3rd, 1875 was little inclined to encourage the application of the doctrine of "relation" or other means whereby the possessory claims of actual settlers on the public lands might be jeopardized or held subject to rights of a railroad company claiming under an act granting land as a gratuity to aid in the construction of railroads, is shown by the passage of an act on June 22nd, 1874, entitled, "For the relief of settlers on the public lands," which contained, among other provisions, the proviso hereinbefore quoted. (1 Supp. Rev. Statute of U. S. (2 Ed.) 1874-1891, p 38, c 400). A reading of this statute makes it apparent that Congress, in its later acts, was disposed to greatly restrict and modify the operation of acts granting land to aid in the construction of railroads, particularly where these grants interfere with possessory claims of actual settlers, made, "after the location of the line of road and prior to the notice to the local land office of the withdrawal of such lands from market." In such spirit, the act of March 3, 1875, must have been passed. This is indicated by the restrictive clauses found in the 3rd and 4th sections of the act which do not appear in prior acts granting lands to aid in the construction of railroads. In accordance with this manifest spirit the land department has always insisted upon a strict construction of the terms of the act

as against the rights of an actual settler, and this court has held that the third section of the act is, "an express provision saving the rights of settlers in possession."

Washington & I. R. Co. vs. Osborn, 160 U. S. 103.

Assuming, however, in the face of the foregoing considerations, that the encouragement of railroad building is an "end of justice," such as will warrant the courts in invoking the doctrine of relation with reference to the title of a railroad company claiming under the act of March 3, 1875, and that, by judicial construction of the act, the title acquired by railroad companies is to be given an operation co-extensive with that acquired by actual settlers under the preemption and homestead laws, the point still remains unsettled as to what act of the railroad company the title shall relate. The act toward appropriation to which the title of homestead and preemption clainants relates, is that of settlement. Acts of settlement, "consist of some substantial and visible improvement of the land, having the character of permanency, with intent to appropriate it under law." "A person is a settler, who intending to initiate a claim, does some act connecting himself with the particular tract claimed, such act being equivalent to the announcement of such intention, from which the public generally may have notice of his claim."

Howden vs. Piper 3 Land Dec. 162.

Davis vs. Davidson 8 Land Dec. 417.

If, therefore, under an analogy, real or fancied, of the operation of the act of March 3, 1875, to the homestead and preemption acts, the title of the railroad company is carried back to some act equivalent to an announcement of its intention to connect itself with a particular tract and from which "the public generally might have notice of its claim," it is apparent that the adoption of its line of route by its board of directors can not be such act. While such act may be some evidence of appropriation it is cleary not notice; and it would be amplifying the rights of the railroad company very much beyond those of the settler to hold that an act done in privacy and wholly uncommunicated to the public should have an importauce and value equal to the "substantial and visible improvement of the land, having the character of permanency, with intent to appropriate it under the law" which must characterize the act of settlement of a homestead or preemption claimant. Only actual construction of its road by a railroad company meets these requirements; or, in case it is proceeding in anticipation of construction under section 4 of the act, then only the notation of its line of route approved, fixed and made definite as required by the act upon the plats of public land displayed in the local land office. If the acts of the actual settler claiming public land in order to come within the cognizance of the homestead and preemption laws must be so substantial, visible and permanent as to operate as notice to the public generally, then it is but just that a railroad com-

pany claiming equal rights should be held to the performance of acts that convey at least the same public notice of its appropriation; and only to the date of such acts can it claim title even under the broad scope allowed the doctrine of relation by express provision of the homestead and preemption acts.

The discussion by counsel of the issues involved in the case at bar seems, therefore, to have moved in a circle and to have returned to the point from which it started and to the question on which, as remarked at the beginning, this controversy hinges: What is the final act under the provisions of section 4, constituting definite location of the right of way. Such act, whether the title of the railroad company springs directly from it or reaches to it by relation of title seems, under all authority, to be the determining factor in construing the act.

At this stage of the discussion it is apparent that the only disagreement between counsel is with reference to the act that constitutes definite location. All other contentions center on this point and it determined, controversy disappears. Counsel for plaintiff in error contends that the first act required by section 4, is an act of definite location.

It is, however, submitted by defendant in error, that the act of definite location, involving

as it does the elements of visible, fixed, final and permanent appropriation accompanied by notice to the public can be only the notation of an approved line of route on the plats of the local land office. This act is the only act referred to in section 4 which includes all required elements; and which is in these particulars equivalent to the act of settlement required of the actual settler.

As this notation upon the plats of public lands by the local land officers is required by section 4 to be made immediately upon the approval of the profile by the Secretary of the Interior, it will be presumed that the land officers do their duty and that the approval and notation are simultaneous. In many of the cases hereinbefore cited the two acts are regarded as identical and the word "approval" is used, interchangeably in speaking of either. As the approval of the Secretary of the Interior is the most important of all the acts prescribed by section 4, and the last permitting of any discretion whatever in the officer performing it, the reason for its prominence of mention is apparent.

The important and permanent effect of the secretary's action has been recognized by this court. "The land over which the right of way was granted were public lands subject to the operation of the statute (Act of March 3, 1875); and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide and when decided, and his approval was

noted upon the plats, the first section of the act vested the right of way in the railroad company. * * * * The railroad company became, at once, vested with the right of property in these lands, of which it can only be deprived by a proceeding taken directly for that purpose."

Noble vs. Union River Logging R. Co.(Supra).

"The important step in the proceeding was the approval by the Secretary of the Interior. His approval was a quasi judicial act; and when his decision is made and approval given it may fairly be presumed that the formalities to be observed and preceding steps to be taken by the railroad company have been observed and taken."

Rierson vs. St. Louis & S. F. Ry. Co. 59 Kan. 32; 51 Pac. 901.

"It is impossible to ignore the Secretary of the Interior without evading the plain language of the act. That officer has an important function in the premises. Must he accept for filing under this act a copy of articles showing that the company is organized to manufacture patent medicines? May not he, in the first instance, determine whether 'due' proofs of organization are offered? The act imposes a duty upon the Secretary in these matters. Noble vs. Union River Logging R. R., 147 U. S. 165, 172, 176. He should withhold his approval of a profile of a road which appears to have been capriciously made or made for an ulterior purpose. Buttz vs. N. P. R. R., 119 U. S. 72. St. P. M. &. M. Ry. vs. Sage, 71 Fed 40, 50. Similarly, therefore, when rival aspirants, for the same right of way file profiles, he should approve the profile of but one company; and to the end that he approve that of

the company with the superior right, he should examine into the facts."

Phoenix & E. R. Co. vs. Arizona E. R. Co. (Ariz.) 84 Pac. 1097.

The high importance of the Secretary's functions under the act of March 3rd, 1875, is well illustrated by the facts of the case last cited above, in which he was called upon to settle the conflicting claims of two railroad companies to a very valuable right of way sixteen miles in length. It is apparent in this case that neither railroad company could claim definite location of its right of way until its line of route received the Secretary's approval.

The supreme importance of the Secretary's functions under section 4 of the act of March 3rd, 1875, gives great weight to the proposition that a railroad company, proceeding under section 4, cannot claim "fixity of location" or "definite location" until this officer's approval of its line of route is secured. The Secretary of the Interior in the performance of these functions represents the United States. His supervisory control extends generally over the public domain. While in a merely local view, perhaps, a grant should be made, the Secretary with a more extensive field of vision, may have in mind considerations of a general or national character that constrain him to refuse approval. He represents the interests of the settlers and of the public generally and may know of circumstances requiring that in the protection of these interests

a certain line of route, though in a local sense desirable, should not be granted. If two lines of route should be claimed by the same railroad company he will approve but one. Where two railroad companies attempt to fix upon the same line, he must decide which has the better right; and may, in the exercise of a wise discretion, refuse approval to the line of route of either company. A consideration of the entire act indicates the wisdom of Congress in making the approval of the Secretary the final and supreme test of the claim of a railroad company to public lands.

In conclusion, we wish to notice, only, the contention of counsel that the leading object of the act of March 3rd, 1875, was the encouragement of railroad building, and that a strict construction of the terms of the act will defeat this purpose. A dark picture is drawn by counsel of evil effects suggested as resulting from a "too rigid" construction of the terms of section 4, especially in cases where a railroad company is proceeding over unsurveyed lands. The first acts of its compliance with the requirements of section 4, he apprehends, will defeat its purpose by inducing a rush of settlers to the locality of the line of route to dispute with the railroad company its title to the right of way. In counsel's view, the rights of the railroad company can be adequately protected, only by a vigorous application, by the courts, of the doctrine of relation of title.

In answer to this contention, it may be said, that even though there were grounds for counsel's apprehension, that of itself would not furnish reason for relaxing the plain provisions of a Congressional act. The grant of land, under the act of March 3rd, 1875, was a gratuity, and Congress, in making this gift of public lands, had an undoubted right to name the conditions under which a railroad must accept it. Having named the conditions and placed restrictions upon the grant, the rights of actual settlers should not be frittered away under a pretence of liberal construction of the act. Aside from this, however, it is evident that the dark anticipation of counsel with reference to a rush of settlers, is unfounded. More than thirty-two years have now elapsed since the passage of the act of March 3rd, 1875, and during this long period, which has been one of remarkable activity in railroad extension over the public lands, surveyed and unsurveyed, this is the first case in which this court has been asked to invoke the doctrine of relation, in order to protect a railroad company in claiming its just rights, under the act.

It is, therefore, respectfully submitted that judgment of the Supreme Court of North Dakota is in accord with a just and proper construction of the act of March 3rd, 1875, and should be affirmed.

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